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No. 99 420

IN THE
Supreme Court of the United States

MIDWEST MOTOR EXPRESS, INC.,
MME, INC., MIDNITE EXPRESS, INC.,
and EXPRESS CARTAGE, INC.,
Petitioners,

v.

CENTRAL STATES SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Seventh Circuit's judgment in this case presents fundamental statutory and constitutional issues concerning the collection of retroactive liabilities under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1368, as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1381-1461.

1. Whether the Seventh Circuit violated ERISA and this Court's decision in *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corporation of California, Inc.* when it held that a second amended complaint could cure the lack of federal subject matter jurisdiction, when the plan filed suit before the withdrawal liability debt became due and prior to any injury in fact to the plan?

2. Whether the imposition of retroactive withdrawal liability on an employer who joined the Plan in 1958 before the enactment of ERISA violates substantive due process when there is no employer conduct in the withdrawal from the Plan, when there was no control or conduct by the employer over any factor that produces underfunding, and when there is no detriment to any retirees or beneficiaries of the plan?

3. Whether the imposition of retroactive withdrawal liability, as applied to the petitioner, is unconstitutional under the *Ex Post Facto* Clause of Article I, Section 9, clause 3 of the U.S. Constitution?

PARTIES TO THE PROCEEDING

Petitioners, who are part of the control group that has been found liable for withdrawal liability under MPPAA are:

1. Midwest Motor Express, Inc.
2. MME, Inc.
3. Midnite Express, Inc.
4. Express Cartage, Inc.

Pursuant to Supreme Court Rule 29.6, petitioners declare that MME, Inc., a privately held company, is the parent company of the other above-named petitioners.

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PETITION FOR WRIT OF CERTIORARI

Midwest Motor Express, Inc., MME, Inc., Midnite Express, Inc., and Express Cartage, Inc. (collectively referred to hereafter as "Midwest") petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-18a) is reported at 181 F.3d 799. Neither the opinion of the district court (App. 19a-50a) nor of the arbitrator (App. 51a-72a) was published.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1999. App. 1a-18a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Petitioner states that 28 U.S.C. § 2403(a) may apply to this case. The notification required by Rule 29.4(b) has been made. Petitioners state further that the United States Court of Appeals for the Seventh Circuit certified to the Attorney General of the United States that the constitutionality of an Act of Congress was drawn into question.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Article I, Section 9, clause 3 of the United States Constitution provides in pertinent part:

> No bill of attainder or ex post facto law shall be passed.

2. Amendment V of the United States Constitution provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia,

when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. 29 U.S.C. § 1382(1)-(3). Determination and collection of liability; notification of employer

> When an employer withdraws from a multiemployer plan, the plan sponsor, in accordance with this part [29 USCS §§ 1381 et seq.], shall—
>
> (1) determine the amount of the employer's withdrawal liability,
>
> (2) notify the employer of the amount of the withdrawal liability, and
>
> (3) collect the amount of the withdrawal liability from the employer.

STATEMENT OF THE CASE

This case presents both a critical issue of subject matter jurisdiction under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461, as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1381-1461 and the question of whether retroactive liabilities in a civil law should continue to be countenanced under either the substantive due process clause of the Fifth Amendment or the *Ex Post Facto* Clause of Article 1, section 9, clause 3.

Specifically, this case concerns the impact of a multiemployer pension plan filing suit against the employer seeking the collection of interim payments of withdrawal liability before the employer had received the plan's Notice and Demand for Withdrawal Liability, before the employer had defaulted on any payment, before the plan had

a cause of action as defined by this Court's recent decision in *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corporation of California, Inc.*, 118 S.Ct. 542 (1997), before the plan had a cause of action as provided in ERISA Section 4202, 29 U.S.C. § 1382 and ERISA Section 4301(a), 29 U.S.C. § 1451(a), and before there was any injury in fact to the plan.

As a constitutional matter, this case presents this Court with the question of whether a retroactive assessment of withdrawal liability under MPPAA against a contributing employer is constitutional when that employer joined the pension fund before the enactment of ERISA or MPPAA, when there is no employer conduct in the withdrawal from the plan, when there is no control over any factor that produces plan underfunding, when there is no detriment to any retiree or beneficiary of the plan, and when it would have economic suicide for the employer to voluntarily withdraw from the plan after the passage of the MPPAA. This Court has not yet ruled on the constitutionality of MPPAA in an "as applied" post-MPPAA constitutional challenge where the Employer joined the plan before the enactment of ERISA.

In addition, this case provides the Court with an opportunity to address the question raised by Justice Thomas last term in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). In his concurrence, Justice Thomas stated that the Court may, in the future, wish to revisit the Court's acceptance of the principle that the *Ex Post Facto* Clause in Article 1, section 9 applies solely to the criminal law.

STATEMENT OF THE FACTS

Midwest is a North Dakota corporation with its headquarters in Bismarck, North Dakota. App. 2a. Beginning no later than 1958, Midwest contributed to Central States on behalf of its union-represented employees pursuant to

the terms of successive collective bargaining agreements. *Id.* Between 1958 and 1991, Midwest made all of its pension contributions to Central States. App. 22a.

Central States is and has been a multiemployer pension plan, governed by a Board of Trustees ("trustees") comprised of trustees appointed by the International Brotherhood of Teamsters ("Teamsters"), and an equal number of trustees appointed by management representatives. App. 20a-21a. The trustees determine the level of benefits paid to participants and beneficiaries. *Id.* Plan actuaries advise the trustees on appropriate benefit levels in light of the plan's assets and income. *Id.* The plan actuaries also determine the level of contributions necessary to support the benefits disbursed. *Id.* When these assessments are too conservative, the plan ends up with a surplus that can be applied to future benefits. App. 11a. When the assessments are too optimistic, unfunded benefits result. App. 11a.

In 1974, Congress enacted ERISA which provided some protection for employees' retirement income and other benefits. In 1980, to address issues that arose under ERISA regarding multiemployer pension plans such as Central States, Congress enacted MPPAA. After withdrawal liability was imposed on employers by MPPAA, Midwest could have voluntarily withdrawn from Central States, although to do so may have been economic suicide, given Midwest's economic circumstances. App. 42a.

Between 1958 and 1991, Midwest's employees worked under a series of collective bargaining agreements, each of which provided for contributions by Midwest to Central States. App. 2a. In March 1991, Midwest's collective bargaining agreement expired, and by August 12, 1991, the union representing Midwest's employees took the employees out on strike. App. 3a.

In January, 1994, one of Midwest's non-striking employees initiated and filed a petition with the National

Labor Relations Board seeking the decertification of the Teamsters as the bargaining agent representing Midwest's employees. App. 55a. As the Arbitrator found, Midwest took no action whatsoever to further the decertification effort, as indeed it could not under federal labor law. App. at 66a. The employees voted to decertify the Teamsters. App. 22a. The National Labor Relations Board certified the results of the election on April 15, 1994. App. 22a.

On April 26, 1994, Central States filed this suit against Midwest for collection of withdrawal liability. App. 5a. On April 27, 1994, one day after Central States had filed its suit, Midwest received Central States' Notice and Demand for Payment of Withdrawal Liability, dated April 26, 1994, advising Midwest of Central States' determination that Midwest had withdrawn from Central States and, consequently, owed withdrawal liability. App. 5a. The Notice and Demand further informed Midwest that Midwest owed $2,546,439.30 in withdrawal liability, payable in a lump sum. App. 5a. The retroactive pre-1980 portion of withdrawal liability was $1,814,856.36. App. 5a. The prospective post-1979 portion of withdrawal liability was $731,582.94. App. 5a.

Midwest demanded arbitration to contest the validity of the assessment on factual and statutory grounds pursuant to 29 U.S.C. §§ 1399(b) and 1401(a). App. 5a.

The arbitrator held hearings on this matter on January 14 and 15, 1997, in Chicago, Illinois. App. 51a. On May 20, 1997, the arbitrator issued his decision and award in this case and corrected certain clerical errors therein by means of a letter dated June 23, 1997. App. 51a *et seq.* The decision and award establishes the factual propositions necessary for Midwest to make its arguments regarding the statutory and constitutional infirmities of Central States' efforts to collect withdrawal liability from Midwest under the MPPAA.

The Arbitrator found the following: (1) Midwest is a pre-ERISA employer that began to contribute to Central States in 1958, well before the enactment of ERISA in 1974 which participation continued after the enactment of ERISA (App. 65a-66a); (2) Midwest's withdrawal from Central States was involuntary (App. 66a); (3) Central States is a defined benefit pension plan and is therefore covered by Title IV of ERISA, but Central States is a hybrid plan as that phrase is used by Justice O'Connor in *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 232-236 (1986) (O'Connor, J., concurring) (App. 68a-69a); (4) Midwest had little control over the level of contributions, the level of benefits, and other factors that produced unfunded vested benefits for Central States from the period between 1973 to the time of Midwest's withdrawal in 1994 (App. 70a); and (5) on the record before the arbitrator, benefit increases by Central States did not unduly add to Midwest's withdrawal liability. App. 71a.

Midwest moved several times for dismissal of the case for lack of subject matter jurisdiction. The district court overruled those motions and heard the case. Central States brought this matter under sections 502(e), 502f, and 4301(c) of ERISA, 29 U.S.C. §§ 1132(e), 1132(f), 1451(c). After the Arbitrator issued his decision Midwest and Central States each moved for summary judgment in the Northern District of Illinois, the Honorable Wayne R. Andersen presiding. The district court issued its Memorandum Opinion and Order on March 30, 1998, and entered judgment thereon on May 19, 1998. App. 50a.

Central States filed its Notice of Appeal on June 17, 1998, and Midwest filed its Notice of Appeal on June 18, 1998. By its own order, the Seventh Circuit consolidated the two cases on July 9, 1998.

In its decision issued June 9, 1999, the Seventh Circuit affirmed the District Court decision, finding that there

was subject matter jurisdiction (App. 7a) and that, as applied to Midwest, MPPAA did not violate the Fifth Amendment guarantee of substantive due process (App. 12a), nor did MPPAA constitute an unconstitutional taking of private property without just compensation. App. 15a, 16a.

REASONS FOR GRANTING THE PETITION

This Court should grant this petition for several reasons. First, the Seventh Circuit's decision defies this Court's recent decision in *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corporation of California, Inc.*, 552 U.S. 192 (1997) which held that a plan's interest in receiving withdrawal liability payments does not ripen into a cause of action until the employer defaults on an installment due and payable under the plan's schedule. Federal courts are courts of strictly limited jurisdiction. The district court did not have subject matter jurisdiction over this action because Central States filed its complaint before a federal claim accrued and before there was any injury in fact to Central States. In this case, Central States instituted this action against Midwest before Midwest had received a notice and demand for withdrawal liability and, consequently, before Midwest had defaulted on an installment under the plan's schedule. The Seventh Circuit circumvented this Court's decision in *Bay Area* by holding that the plan's second amended complaint cured this jurisdictional defect. By misconstruing Rule 15(c) of the Federal Rules of Civil Procedure, the lower court has created new federal subject matter jurisdiction and undermined *Bay Area.*

Another reason this Court should grant this petition is that the district court erred in ignoring the clear mandate of ERISA that collection efforts must follow, not precede or coincide with, notification of an assessment of withdrawal liability. ERISA Section 4202, 29 U.S.C. § 1382.

This is a case of first impression on the statutory mandate of ERISA Section 4202.

Furthermore, this Court should grant this petition to establish the parameters of permissive retroactivity in civil laws under two clauses of the Constitution. First, in her concurrences in *Connolly v. PBGC*, 475 U.S. 211 (1986) and *Concrete Pipe v. Construction Laborers Pension Trust Fund*, 508 U.S. 602 (1993), Justice O'Connor stated that the constitutionality of MPPAA would be open to serious question either in the absence of any rational connection between the employer's conduct and some detriment to the beneficiaries of the plan or if withdrawal liability were assessed against an employer who began participation in a pension plan before ERISA was enacted without any expectation that it must make good on any plan underfunding. Midwest satisfies each of the criteria established by Justice O'Connor and, indeed, presents a stronger factual case than the one expressed by her concerns. The application of Justice O'Connor's factors, the involuntary nature of Midwest's withdrawal, the lack of any employer conduct over factors that produce plan underfunding and the lack of any harm to any plan beneficiaries make the imposition of retroactive withdrawal liability on Midwest irrational and, therefore, unconstitutional under the Due Process Clause of the Fifth Amendment.

This petition also presents the issue raised, but not addressed, in the *Eastern Enterprises* case decided last term, wherein Justice Thomas wrote a concurring opinion, saying that the time may have arrived to revisit the principle first enunciated by this Court in *Calder v. Bull*, 3 Dall. 386, 1 L. Ed. 648 (1798) that the *Ex Post Facto* Clause applies only in the criminal law context. Justice Thomas announced his willingness to reconsider *Calder* in the light of the general principle of American jurisprudence that "retrospective laws are, indeed, generally

unjust." 2 J. Story, *Commentaries on the Constitution* § 1398 p. 272 (5th ed. 1981). Justice Thomas stated that he would be willing to consider that a case that "passed muster" under the Takings Clause could be held unconstitutional under the *Ex Post Facto* Clause. This case, which the Seventh Circuit has found constitutional under a Takings Clause analysis, presents such an opportunity.

ARGUMENT

I. THE DISTRICT COURT SHOULD HAVE DISMISSED CENTRAL STATES' ACTION FOR LACK OF SUBJECT MATTER JURISDICTION AND THE SEVENTH CIRCUIT IGNORED THIS COURT'S MANDATE IN *BAY AREA* IN AFFIRMING THE DISTRICT COURT

Central States brought suit against Midwest before any claim for relief, as defined by this Court's *Bay Area* decision, had accrued to its benefit. Consequently, the district court lacked subject matter jurisdiction over Central States' claims against Midwest. The Seventh Circuit ignored the *Bay Area* decision in affirming the district court, basing its decision on factual and legal errors discussed *infra* at pp. 13-16.

Central States' premature commencement of its suit against Midwest deprived the district court of subject matter jurisdiction. Federal courts are courts of strictly limited jurisdiction. This Court has stated "[this Court] wisely adopted a presumption that every federal court is 'without jurisdiction' unless 'the contrary appears affirmatively from the record.' That presumption is just as inflexible in this Court as in any other federal court." *Delaware v. Van Arsdall*, 475 U.S. 673, 692 (1986) (citations omitted). Central States cannot overcome that presumption in this case.

The district court lacked subject matter jurisdiction over Central States' action to collect withdrawal liability

from Midwest because Central States filed its complaint before a federal claim accrued in its favor. On April 26, 1994, Central States filed this suit against Midwest for collection of withdrawal liability. App. 5a. On April 27, 1994, one day after Central States had filed its collection suit, Midwest received Central States' Notice and Demand for Payment of Withdrawal Liability, dated April 26, 1994, advising Midwest of Central States' determination that Midwest had withdrawn from Central States and, consequently, owed withdrawal liability. App. 5a. According to the Notice and Demand for Payment of Withdrawal Liability, the first payment to Central States from Midwest was not due until May 1, 1994.

This Court held in *Bay Area* that a cause of action for collection of withdrawal liability does not accrue until such time as a withdrawing employer has been notified of its obligation to pay withdrawal liability and failed to make a payment demanded in the assessment. *Bay Area*, 522 U.S. 192 (1997). Justice Ginsberg, writing for a unanimous Court stated:

> In sum, we hold that the MPPAA does not give a pension plan any claim for relief against an employer on the date of withdrawal. The plan's interest in receiving withdrawal liability does not ripen into a cause of action triggering the limitations period until two events transpire. First, the trustees must calculate the debt, set a schedule of installments, and demand payment pursuant to § 1399(b)(1). Second, the employer must default on an installment due and payable under the trustees' schedule. Only then has the employer violated a duty owed the plan under the Act.

Id. at 202. Only when an employer has violated a duty to a plan under MPPAA may the plan sue the employer: "[u]ntil the employer fails to honor its obligation, the plan cannot sue." *Id.*

As of April 26, 1994, the date Central States filed its complaint, Midwest had not yet received the assessment of withdrawal liability from Central States, and had, thus, not been notified of the debt or the schedule of payments, and *a fortiori,* had not defaulted "on an installment due and payable under the trustees' schedule." *Id.* Under the holding in *Bay Area,* then, Central States "cannot maintain an action until the employer misses a scheduled withdrawal liability payment. The statute of limitations does not begin to run until that time." *Id.* at 200-01.

Central States lacked a claim for collection of withdrawal liability against Midwest when it filed this action, and several courts have found that the lack of a ripe claim is a fatal defect that deprives federal courts of subject matter jurisdiction. *Greenbriar, Ltd. v. City of Alabaster,* 881 F.2d 1570, 1573 n.7 (11th Cir. 1989) (questions concerning ripeness go to subject matter jurisdiction); *St. Clair v. City of Chico,* 880 F.2d 199, 201-02 (9th Cir. 1989) ("like other challenges to a court's subject matter jurisdiction, motions raising the ripeness issue are treated as brought under Rule 12(b)(1). . . ."); *Villas of Lake Jackson, Ltd. v. County of Leon,* 796 F. Supp. 1477, 1480 (N.D. Fla. 1989) (premature suit destroys federal question-jurisdiction). *Greenbriar, Ltd., St. Clair,* and *Villas of Lake Jackson,* lead to the inescapable conclusion that because Central States lacked a claim, the district court lacked subject matter jurisdiction to decide the case.[1] The Seventh Circuit's holding, therefore,

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[1] The Supreme Court's recent decision in *Steel Co. v. Citizens For A Better Environment,* 118 S. Ct. 1003 (1998), is not to the contrary. In that case, the petitioning company filed a motion to dismiss under Fed. R. Civ. P. 12(b)(1) and (6) seeking dismissal of a private enforcement action for declaratory and injunctive relief filed under the citizen-suit provision of the Emergency Planing and Community Right-to-Know Act of 1986 (EPCRA), 42 U.S.C. § 11046(a)(1), after the company had corrected the alleged deficiency. The Supreme Court vacated and remanded the Seventh

creates a conflict with the Ninth and Eleventh Circuits, as well as disregarding the law prescribed in this Court's recent decision in *Bay Area*.

Central States' premature initiation of this action also deprived the district court of subject matter jurisdiction,

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Circuit's decision allowing the case to proceed, reinstating the district court's dismissal of the complaint pursuant to petitioner's motion to dismiss. As a threshold matter, the Supreme Court held that the merits issue in this case, whether EPCRA permitted citizen-suits for purely past violations, was not "jurisdictional" for purposes of defeating the district court's subject-matter jurisdiction. While the Supreme Court found that a district court's subject-matter jurisdiction is not defeated by the absence of a valid (as opposed to arguable) cause of action, 118 S. Ct. At 1007, the Court reaffirmed its long-standing jurisdictional precedents holding that an action may not proceed where the plaintiff does not have standing to sue at the time the complaint is filed, because of the absence of a case or controversy under Article III, § 2 of the Constitution. 118 S. Ct. at 1016. The Court restated the three requirements for the "irreducible constitutional minimum of standing" for subject-matter jurisdiction, including that, "'[f]irst and foremost, there must be alleged (and ultimately proven) an 'injury in fact'—a harm suffered by the plaintiff that is 'concrete' and 'actual or imminent,' not 'conjectural' or 'hypothetical.' "—(citation omitted). 118 S. Ct. at 1016.

In the present case, Midwest has contended consistently throughout the litigation that standing was lacking due to the prematurity of the complaint. Of course, this jurisdictional argument could even be raised by a reviewing court *sua sponte*. 118 S. Ct. at 1011, 1012-13. Central States suffered no "injury in fact"—the first requirement of the standing test, 118 S. Ct. at 1016—at the time it filed the complaint in this action, since the notice and demand for withdrawal liability payment, that *might* have eventually resulted in a default by Midwest, had been sent out simultaneously with the filing of the present complaint, and, therefore, had not even been received by Midwest, let alone defaulted on, at the time the complaint was filed. For the same reason, the present case is distinguishable from *Steel Co.* because it involved the anticipatory filing of a cause of action, rather than, as in *Steel Co.*, the filing of a cause of action seeking to remedy a past, no-longer-existing complaint. This distinction clearly denotes the "injury in fact" issue in the present case, supporting the absence of subject-matter jurisdiction due to a lack of standing, from the threshold analysis in *Steel Co.*

because it violated MPPAA's mandatory withdrawal liability provisions, which required that Central States sequentially determined the amount of the withdrawal liability; notify the employer of the amount of withdrawal liability; and then, and only then, collect the withdrawal liability from the employer. ERISA Section 4202, 29 U.S.C. § 1382. This court's decision is *Bay Area* confirmed the necessity for this sequential procedure: first, the trustees must calculate the debt, set a schedule of installments and demand payment pursuant to section 1399(b)(1). Second, the employer must default on an installment due and payable under the trustees' schedule. Only then has the employer violated a duty owed the plan under the Act. *Bay Area,* at 202.

The district court and the Seventh Circuit went to great lengths to ignore the impact of *Bay Area* on Central States' case, despite vigorous arguments by Midwest. The Seventh Circuit never referred to *Bay Area* in its decision (App. 1a-18a), and the district court provided only a cursory citation without discussion. App. 27a. The principal rationale relied upon by the Seventh Circuit for finding subject matter jurisdiction was that the second amended complaint cured any jurisdictional defect. This holding has significant ramifications for ERISA and other federal laws. It contravenes this Court's holding in *Bay Area* and is contrary to the Federal Rules of Civil Procedure. The Seventh Circuit admitted that "even if there were jurisdictional problems when Central States filed its complaint, Central States remedied them when it filed a second amended complaint. . . ." App. 7a. This rationale fails because it ignores the clear directive of Rule 15(c)(2) of the Federal Rules of Civil Procedure which provides that an amended complaint "relates back" to the date on which the original complaint was filed, when the claim arises out of the same transaction attempted to be set forth in the original pleading. Fed. R. Civ. P. 15(c).

The general policy of Rule 15(c) is to allow relation back where there is no prejudice to non-moving parties. *Employees Sav. Plan of Mobil Corp. v. Vickery,* 99 F.R.D. 138 (S.D.N.Y. 1983). It is intended to prevent the statute of limitations from barring action on other causes of action or against other parties, provided the court had proper subject matter jurisdiction under the original complaint. Rule 15(c) does not and cannot create or extend federal court jurisdiction. *USM Corp. v. GKN Fasteners, Ltd.,* 578 F.2d 21 (1st Cir. 1978). Since Central States' withdrawal liability claim against Midwest arose out of the same withdrawal, the amended complaint "relates back" to April 26, 1994, a date on which no claim would have arisen to benefit Central States. *Bay Area* at 202. Contrary to the Seventh Circuit's holding, the second amended complaint cannot cure this jurisdictional defect.

The Seventh Circuit gave three other reasons for finding federal subject matter jurisdiction. First, the Seventh Circuit noted that the Eighth Circuit had rejected Midwest's argument (App. at 7a). In fact, the Eighth Circuit merely transferred the case to the Northern District of Illinois based on the first-filed rule and abstained from ruling on the merits of Midwest's contention that Central States' claim was premature and without jurisdiction: "if the claims are legally infirm, we trust the Illinois court to dismiss them." *Midwest Motor Express, Inc. v. Central States,* 70 F.3d 1014, 1017 (8th Cir. 1995).

The Seventh Circuit then stated, without benefit of legal or factual support, that Midwest conceded in its declaratory action in the District of North Dakota the premise that would make Central States' action ripe in the Northern District of Illinois, *i.e.,* that Midwest believed that it had no retroactive liability, gave the Northern District of Illinois subject matter jurisdiction of this suit. Contrary to the Seventh Circuit's excessively narrow

conception of defects in subject matter jurisdiction, defects of subject matter jurisdiction cannot be cured by consent of the parties or waived or ignored. *See* 5A C. Wright & A. Miller, *Federal Practice and Procedure,* § 1350 at 204-205 (1990). As this Court has stated:

> Subject-matter jurisdiction, then, is an Art. III as well as a statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign. Certain legal consequences directly follow from this. For example, no action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant. *California v. LaRue,* 409 U.S. 109 (1972), principles of estoppel do not apply, *American Fire & Casualty Co. v. Finn,* 341 U.S. 6, 17-18 (1951), and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings. Similarly, a court, including an appellate court, will raise lack of subject-matter jurisdiction on its own motion. "[T]he rule, springing from the nature and limits of the judicial power of the United States is inflexible and without exception, which requires this court, of its own motion, to deny its jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record." *Mansfield, C. & L. M.R. Co. v. Swan,* 111 U.S. 379, 382 (1884).

Insurance Corporation of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U. S. 694, 702 (1982) (footnote omitted). In addition, the jurisdictional argument that standing was lacking due to the prematurity of the complaint may be raised by a reviewing court *sua sponte. Steel Co.* at 1011, 1012-13.

Third, the Seventh Circuit invoked the doctrine of "judicial estoppel" to preclude Midwest from arguing that

federal jurisdiction was not present. Judicial estoppel bars a party that has successfully taken a position in one litigation from taking a different position in a subsequent litigation. This rationalization is inapposite, because in both circuits, Midwest's position consistently has been that the Northern District of Illinois did not have jurisdiction over Central States' suit. 70 F.3d at 1017 and App. at 7a. Midwest also did not succeed in its argument before the Eighth Circuit. *Id.* Thus, judicial estoppel does not apply.

The Seventh Circuit is wrong on the law, and its error, which was based on several factual errors, puts the Seventh Circuit in conflict with the Ninth and Eleventh Circuits. The Seventh Circuit, and other federal courts in future decisions, should not be permitted to evade the clear mandate of *Bay Area* by holding that a second amended complaint can cure the lack of subject matter jurisdiction.

II. MPPAA VIOLATES THE SUBSTANTIVE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AS APPLIED TO MIDWEST

In *Eastern Enterprises v. Apfel,* this Court recently invalidated a retroactive statute partially on the grounds that retroactivity is of dubious constitutionality even when the retroactive statute is the sort of economic regulatory legislation that routinely survives challenges based on substantive due process. *Eastern Enterprises v. Apfel,* 524 U.S. 498, 118 S. Ct. 2131 (1998). The Supreme Court found that: "[r]etroactivity is generally disfavored in the law, *Bowen v. Georgetown Univ. Hospital,* 488 U.S. 204, 208, 109 S. Ct. 468, 469-470, 102 L. Ed. 2d 493 (1998), in accordance with 'fundamental notions of justice' that have been recognized throughout history, *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 494 U.S. 827, 855, 110 S. Ct. 1570, 1586-1587, 108 L. Ed. 2d 842 (1990) (Scalia, J., concurring)." *Id.* at p. 2151. The

Seventh Circuit noted the history that made it impossible to responsibly contemplate finding a statute unconstitutional on substantive due process grounds. However, the power of that principle is attenuated because this case perfectly reflects the logic of Justice O'Connor's concurrence in *Connolly* and *Concrete Pipe*, and, indeed, presents a stronger portrayal of Justice O'Connor's concerns because: (1) there was no employer conduct in the withdrawal of the employer from the plan by decertification by the employees; (2) the record of both lower courts established that the plan, through its actuaries, controlled the level of pension benefits, which is the critical factor that creates plan underfunding, and the plan also controlled the level of pension contributions; (3) the liability is exclusively retroactive, depriving the employer of access to any of MPPAA's ameliorating provisions; and (4) the retroactivity is extreme, assessing liability in 1994, for a 1991 withdrawal to collect liability assessed because of the employer's participation in the plan between 1975 and 1979. The injustice is clear.

Justice O'Connor's concurrence in *Connolly* under the Due Process Clause provides the framework for the first part of this constitutional challenge:

> Our recent cases leave open the possibility that the imposition of retroactive liability on employers for the benefit of employees may be so arbitrary and irrational *in the absence of any connection between the employer's conduct and some detriment to the employee.* See *Turner Elkhorn, supra,* at 19, 24-26; *Pension Benefit Guaranty Corporation v. R.A. Gray & Co., supra,* at 733 (discussing *Railroad Retirement Board v. Alton R. Co.,* 295 U.S. 330 (1935)).

Connolly, 475 U.S. at 229 (O'Connor, J. concurring) (emphasis added).

The imposition of MPPAA withdrawal liability on Midwest, which began participation in Central States, a

hybrid Taft-Hartley plan, 16 years before the enactment of ERISA and 22 years before the enactment of MPPAA is unconstitutional when the withdrawal is occasioned by no act of Midwest and where there is no record evidence that there has been any harm to the participants or beneficiaries of the hybrid Taft-Hartley Plan. *See generally, Connolly,* 475 U.S. 211. (O'Connor, J. concurring); *Concrete Pipe,* 508 U.S. 602. (O'Connor, J. concurring). There is no "employer conduct" in this case, nor is there any "detriment to the employees."

Midwest meets its burden of demonstrating that the legislature acted in an arbitrary and irrational way in this case. *Connolly,* 475 U.S. at 228-29 (O'Connor concurring) (citing *Usery v. Turner Elkhorn Mining Co.,* 429 U.S. 1, 15-16 (1976)). The Supreme Court has never intimated that Congress possesses unlimited power to 'readjus[t] rights and burdens . . . [and] upse[t] otherwise settled expectations.' *Id.* More recently, the Supreme Court, in reference to its opinions in *Turner Elkhorn, Connolly,* and *Concrete Pipe,* stated:

> Our decisions, however, have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience.

Eastern Enterprises v. Apfel, 118 S. Ct. 2131, 2149 (1998). The retroactive liability is severe because Central States assessed liability in 1994 for a 1991 withdrawal seeking to collect liability incurred because of Midwest's participation in the plan between 1975 and 1979. Moreover, this retroactive liability also unfairly singles out Midwest, since MPPAA requires multiemployer plans to reduce their obligation as fully amortized in level annual payments over 15 years, and therefore, no other

current contributing employer has any pre-1980 retroactive liability. ERISA Section 4211(c)(2)(B), 29 U.S.C. § 1391(c)(2)(B).

On the issue of severe retroactivity, four members of the plurality in *Eastern Enterprises* stated:

> Even in areas in which retroactivity is generally tolerated, such as tax legislation, some limits have been suggested. *See e.g., United States v. Darusmont*, 449 U.S. 292, 296, 297, 101 S.Ct. 549, 551-552, 66 L.Ed 2d 513 (1981) (*per curiam*) (noting Congress' practice of confirming retroactive application of tax provisions to 'short and limited periods').

118 S. Ct. at 2142. In contrast, Midwest's retroactivity is a 15 to 19 year reach-back to the retroactive period of 1975 to 1979 from Central States' Notice and Demand for Withdrawal Liability issued in 1994.

A. Midwest Joined Central States Before It Could Possibly Have Anticipated Withdrawal Liability

Midwest is a pre-ERISA employer, joining Central States no later than 1958, a full 16 years before ERISA was enacted and 22 years before MPPAA was enacted. In her concurrence in *Concrete Pipe*, Justice O'Connor expressed a special concern with respect to employers such as Midwest: "I agree that a withdrawing employer can be held responsible for its statutory 'share' of unfunded vested benefits if the employer should have anticipated the prospect of withdrawal liability when it joined the plan." *Concrete Pipe*, 508 U.S. at 647. (O'Connor, J., concurring). Justice O'Connor elaborated on this concern later in the same opinion:

> I also note that the Court's opinion should not be read to imply that employers may be subjected to retroactive withdrawal liability simply because 'pension plans [have] long been subject to federal regulation.' Surely the employer that joined a multi-

> employer plan before ERISA had been promulgated —before Congress had made employers liable for unfunded benefits—might have a strong constitutional challenge to retroactive withdrawal liability.

Id. at 649.

Midwest is precisely the sort of employer Justice O'Connor foresaw in her concurrence in *Concrete Pipe*. Midwest joined Central States in 1958 long before there was any idea of withdrawal liability. App. 3a. In fact, Midwest could not have anticipated the possibility of withdrawal liability when it joined Central States. The trust agreements governing Midwest's participation in Central States made clear that the sum total of Midwest's responsibility to Central States was to pay the collectively bargained contribution rate for concerned employees on time and in full. Between 1958 and 1991, Midwest made all of its pension contributions to Central States. App. 3a. Sixteen years later in 1974, and then again in 1980, Congress radically changed the legal relationship among Central States and its contributing employers, among them, Midwest. Midwest had no control over the events that changed its obligations to Central States and had no meaningful opportunity in 1974 to avoid the obligations of ERISA. In the arbitration decision, the arbitrator acknowledged that Midwest would have risked extinction had it withdrawn from Central States in the early days of MPPAA given Midwest's economic circumstances. App. 70a. Under the reasoning expressed by Justice O'Connor, Midwest should not be held responsible for retroactive withdrawal liability.

B. Because Midwest's Withdrawal From Central States Was Involuntary, Midwest Should Not Be Held Liable for Withdrawal Liability

Employer conduct, leading employees to see the employer as the source of their benefits must, according to

Justice O'Connor, be a hallmark of constitutional imposition of withdrawal liability on an employer:

> In essence, my position is that the 'imposition of this type of retroactive liability on employers, to be constitutional, must rest on some basis in the employer's conduct that would make it rational to treat the employees' expectation of benefits under the plan as the employer's responsibility.' The Court does not hold otherwise [in the majority opinion].

Concrete Pipe, 508 U.S. at 647 (quoting *Connolly,* 475 U.S. at 229). Arbitrator Pritzker ruled clearly that Midwest's withdrawal was involuntary. App. 66a. Plainly, the withdrawal itself, without more, cannot be conduct within the scope of the "employer conduct" described by Justice O'Connor in the quoted section above, because it was not Midwest's conduct, either in fact or law.

The district court found as a matter of law that Midwest exercised "sufficient influence and control over the chain of events that culminated in the decertification." App. 39a. The district court cited neither facts nor precedent in support of its legal conclusion. Not only is the district court's legal conclusion unsupported in either fact or law, it is wrong, as is the Seventh Circuit decision affirming it. An arbitrator decides facts by a preponderance and his findings of fact may be set aside only if clearly erroneous. *Jos. Schlitz Brewing Co. v. Milwaukee Brewery Workers' Pension Plan,* 3 F.3d 994, 999 (7th Cir. 1993), aff'd, 513 U.S. 414 (1995). The district court made a specific finding that "Midwest did not, and could not, directly participate in the decertification decision." App. 39a. Nonetheless, the district court found that there was "sufficient control" over the chain of events that culminated in the decertification. *Id.* According to the district court, Midwest took no part in the process, but nonetheless the conduct of its employees will be attributed to its "influence and control" over events. This conclusion

lacks rationality. The Seventh Circuit's repetition of the district court's irrational statement without examination or explanation is equally without an appreciation for the facts as found by the arbitrator. App. at 16a.

C. Midwest Had No Control Over The Level Of Benefits Or Any Other Factor That May Produce Unfunded Vested Benefits for Central States

The employees' conduct in decertification is not the only conduct over which Midwest had neither control nor influence. The district court found that:

> The Trustees determined the level of benefits paid to participants and beneficiaries. Actuaries [of the Plan] advise the Trustees on appropriate benefit levels in light of the plan's assets and income. The actuaries also determine the level of contributions necessary to support the benefits disbursed.

App. 21a. There is only one critical factor that creates plan underfunding. This factor is the determination of the level of pension benefits. Both in fact and in law, this is solely a responsibility of the trustees of the plan. The district court found that the trustees determine the level of benefits for the plan. App. at 21a. The Seventh Circuit explained that underfunding is created when pension benefits are promised at a higher level than can be supported by pension contributions. App. at 11a. Under this Court's *Amax Coal* decision, the duty of a management appointed trustee is "directly antithetical" to the role of agent of the entity that appoints the trustee and all trustees are required to discharge their duty solely in the interests of the retirees and beneficiaries. *NLRB v. Amax Coal Co.*, 453 U.S. 322, 331-32 (1981). The district court also agreed that Midwest was correct when it pointed out that it had no control over the decisions rendered by the Central States trustees because they must act for the exclusive benefit of the beneficiaries, rather than as agents of the employer or the union. App. 45a.

Thus, both factually and legally, Midwest had no control over the establishment of the level of pension benefits.

The determination of pension contributions may be a factor in the *determination,* as opposed to creation, of plan underfunding because the determination of pension contributions, together with return on investments, sets the amount of income for the plan. And, the present value of plan assets either is greater than or less than vested benefits, which determines an employer's share of withdrawal liability. App. 30a-31a. However, the district court's recognition that plan actuaries determine the level of contributions should be followed. App. 21a. Moreover, the determination of pension contributions is not a factor in the *creation* of plan underfunding. That role belongs to the plan actuaries who make the actuarial assessments that create either plan surpluses or plan underfunding. App. 11a.

Therefore, plan actuaries are responsible for (1) the determination of the level of pension benefits (App. 21a); (2) the determination of plan contributions (App. 21a); and (3) the actuarial assessments that create either plan surpluses or plan underfunding (App. 11a). Midwest played no role in this entire process.

Nevertheless, in direct contradiction with its own findings of fact, together with the facts above, the district court held:

> Moreover, Midwest exercised sufficient control over the level of contributions, the collective bargaining process, and other factors affecting Central States' unfunded vested benefit liabilities to satisfy the lenient rational basis test. Midwest voluntarily chose to appoint an employer association to handle its collective bargaining and knew that the contracts negotiated on its behalf were binding. Significantly, Midwest admits that the collective bargaining agreements as negotiated by the union and employer associations,

> set the levels of contributions paid by the employers. (Def. Reply in Support of SJ, p. 19). Additionally, if Midwest was displeased with the terms of the collective bargaining agreements negotiated by its employer association, Midwest could have withdrawn from the association, as it did in late 1990, and negotiate on its own behalf. Thus, as a matter of law, we find that Midwest exercised little, but sufficient meaningful control over the contribution levels it was required to pay, a factor affecting Central States' unfunded vested benefits.

App. 46a. The Seventh Circuit accepted the district court's view of Midwest's "control," but emphasized that Midwest had control over Central States' trustees because it was "represented on the Central States board through the employer's association." App. 16a. The Seventh Circuit effectively reversed this Court's determination in *Amax Coal* that management trustees are required to discharge their duties solely in the interests of the beneficiaries of the plan. As a matter of law, Midwest had no control over the Central States trustees.

However, both the district court and the Seventh Circuit missed the point of Justice O'Connor's test which required a connection between the employer's conduct and some detriment to the employee in order for the statute to be constitutional. Giving the district court every benefit of the doubt (whether justified by the law or not), there still is no connection between this employer conduct and any detriment to the retirees and beneficiaries of the plan. As noted by the Seventh Circuit, the critical element that creates plan underfunding is the establishment of the level of pension benefits:

> The plan trustees (appointed equally by the employers and the union) determine the level of benefits according to actuarial assessments of the plan's value and future performance. When these assessments are too conservative, the plan ends up with a surplus

> that can be applied to future benefits. When the assessments are too optimistic, unfunded benefits result.

App. 11a. This is solely a responsibility of the trustees. Underfunding is created when pension benefits are promised at a higher level than can be supported by pension contributions. Therefore, a determination by this Court that trustees are responsible for plan surpluses or underfunding would place responsibility on plan trustees.

The district court also misses the point when it finds that Midwest could have withdrawn from the association, and, therefore, as a matter of law, the district court found that Midwest exercised little, but sufficient meaningful control over the contribution levels it was required to pay. If a strategic withdrawal from the association was the only real control Midwest had, as found by the court, such control is non-existent. The power to leave a relationship demonstrates the lack of power within the relationship. If Midwest's only control was to leave the association, then Midwest effectively had no control over the internal aspects of the association.

D. Midwest's Withdrawal Has Not Caused Any Harm To Retirees Or Beneficiaries In Central States

Central States' assets grew from $2.970 billion in 1980 to $11.801 billion in 1991. App. 21a. In 1980, Central States' vested benefits were valued at $7.206 billion. *Id.* By 1991, vested benefit liabilities amounted to $12.979 billion. *Id.* During Midwest's participation in Central States following the passage of MPPAA from 1980 to 1991, the unfunded vested benefits of Central States were reduced from $3.744 billion (52% of vested benefit liabilities) to $1.76 billion (13.6% of vested benefit liabilities). *Id.* Given the growth in assets of the plan, and the decrease of unfunded vested benefit liabilities of the Plan from 1980 to 1991, clearly there is no evidence that

Midwest's withdrawal has caused any harm to active participants or retirees in Central States.

E. Central States Is A "Hybrid Taft-Hartley" Plan, Outside of Midwest's Control

The district court adopted Arbitrator Pritzker's finding that Central States is a hybrid Taft-Hartley plan in the sense used by Justice O'Connor in her concurring opinion in *Connolly*. *Connolly*, 475 U.S. at p. 232. App. 48a. The district court then stated that

> Midwest's circumstances fall outside of Justice O'Connor's constitutional concerns. Justice O'Connor was concerned with employers who had 'no control over the level of benefits promised.' Because Midwest exercised some control over the factors affecting its withdrawal liability, application of the MPPAA is rational and not arbitrary.

App. 48a (internal citations omitted). The district court comments concerning Midwest control make no sense because plan trustees set the level of benefits, and the setting of the benefit level is the critical factor that creates plan underfunding.

III. MPPAA's RETROACTIVE LIABILITY IS AN UNCONSTITUTIONAL EX POST FACTO ENACTMENT

In *Eastern Enterprises v. Apfel*, this Court recently made the following observation:

> Retroactivity is generally disfavored in the law, *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208, 109 S. Ct. 468, 469-470, 102 L. Ed. 2d 493 (1988), in accordance with "fundamental notions of justice" that have been recognized throughout history, *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 855, 110 S. Ct. 1570, 1586-1587, 108 L. Ed. 2d 842 (1990) (SCALIA, J., concurring).

Eastern Enterprises v. Apfel, 524 U.S. 498, 118 S. Ct. 2131, 2151 (1998). The Court further noted that "it is

a principle in the *English* common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect." *Id. quoting Dash v. Van Kleeck,* 7 Johns. 477, 503 (N.Y. 1811). As this Court in *Eastern Enterprises* also noted "[r]etrospective laws are, as a rule, of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law." *Id. quoting* H. Broom, Legal Maxims 24 (8th ed. 1911). As the Court noted, "[i]n his Commentaries on the Constitution, Justice Story reasoned, '[r]etrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact.' *Id. quoting* 2 J. Story, Commentaries on the Constitution § 1398 (5th ed. 1891). Nor, the Court noted, is this a peculiarly American preoccupation:

> [a] similar principle abounds in the laws of other nations. See, e.g., *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue,* 66 D.L.R. 3d 449, 462 (Can. 1975) (discussing rule that statutes should not be construed in a manner that would impair existing property rights); The French Civil Code, Preliminary Title, art. 2, p. 2 ('Legislation only provides for the future; it has no retroactive effect') (J. Crabb trans., rev. ed. 1995); Aarnio, Statutory Interpratetion in Finland 151, in Interpreting Statutes: A Comparative Study (D. MacCormick & R. Summers eds. 1991) (discussing prohibition against retroactive legislation).

Id. The Court summed up its treatment of this issue as follows: " 'Retroactive legislation,' we have explained, 'presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset set-

tled transactions.' *General Motors Corp. v. Romein,* 503 U.S. 181, 191, 112 S. Ct. 1105, 1112, 117 L. Ed. 2d 328 (1992)." *Id.*

In the instant case there is an employer who agreed no later than 1958 to begin participation in a union-management sponsored pension plan. Its obligation as a contributing employer could be summed up fairly easily: make all necessary contributions in full and on time. If the employer did that, it had no further monetary obligations to the pension fund. Beginning in 1974, however, and reaching a culmination in 1980 with the enactment of MPPAA, this world changed in a manner that Midwest did not and could not have foreseen. From a date preceding the enactment of MPPAA, Midwest would be held responsible retroactively for its pro rata share of the pension plan's underfunding. The retroactivity of this enactment meant that there was no way it could alter its conduct so as to avoid the burdens imposed by the statute. There is a ripe case here to determine whether, as Justice Thomas suggested in his concurrence in *Eastern Enterprises,* there is a role for the *ex post facto* Clause regarding legislation outside the criminal law:

> I write separately to emphasize that the *Ex Post Facto* Clause of the Constitution, Art. I, § 9, cl. 3, even more clearly reflects principle that "[r]etrospective laws are, indeed, generally unjust". 2 J. Story, Commentaries on the Constitution § 1398, p. 272 (5th ed. 1981). Since *Calder v. Bull,* 3 Dall. 386, 1 L.Ed. 648 (1798), however, this Court has considered the *Ex Post Facto* Clause to apply only in the criminal context. I have never been convinced of the soundness of this limitation, which in *Calder* was principally justified because a contrary interpretation would render the Takings Clause unnecessary. *See id.,* 3 U.S., at 394 (opinion of Chase, J.). In an appropriate case, therefore, I would be willing to reconsider *Calder* and its progeny to determine

> whether a retroactive civil law that passes muster under our current Takings Clause jurisprudence is nonetheless unconstitutional under the *Ex Post Facto* Clause.

Eastern Enterprises at 2154.

In addition, there are two statements within this Court's decision in *Calder v. Bull,* which suggest the merits of Justice Thomas' concerns. For example, Justice Chase stated that:

> The prohibition, 'that no state shall pass any *ex post facto* law,' necessarily require some explanation; for naked and without explanation, it is unintelligible, and means nothing.

3 Dall 386, 390, 1 L. Ed. 648, 650. Justice Chase also stated:

> I am under a necessity to give a construction, or explanation of the words '*ex post facto* laws,' because they have not any certain meaning attached to them.

3 Dall. 386, 395, 1 L. Ed. 648, 652. These statements suggest that Justice Chase was uncertain of his decision, particularly in light of his statement earlier in his opinion that:

> Every law that takes away, or impairs, rights vested, agreeable to existing laws is retrospective, and is generally unjust, and may be oppressive; and it is a good general rule that a law should have no retrospect; but there are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement; such as statutes of oblivion, or pardon.

3 Dall. at 391, 1 L. Ed. at 650.

Finally, a statement by Justice Iredell in *Calder v. Bull* suggests that the Eighteenth Century was preoccupied (perhaps appropriately) with guarding against tyranny:

> Still, however, in the present instance, the act or resolution of the legislature of Connecticut, cannot

> be regarded as an *ex post facto* law; for, the true construction of the prohibition extends to criminal, not to civil cases. It is only in criminal cases, indeed, in which the danger to be guarded against, is greatly to be apprehended.

3 Dall. 386, 399, 1 L. Ed. 648, 654.

The apparent uncertainty of this Court in its decision in *Calder v. Bull* limiting the *ex post facto* clause to criminal cases, together with the Eighteenth Century's preoccupation with guarding against tyranny, supports Justice Thomas' concerns that it is now time for this Court to reexamine this issue and *Calder v. Bull* should be reviewed.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 98-2512 & 98-2588

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, a pension trust, and HOWARD MCDOUGALL, trustee,
Plaintiffs-Appellees, Cross-Appellants,

v.

MIDWEST MOTOR EXPRESS, INC., a North Dakota corporation, MME, INC., MIDNITE EXPRESS, INC., and EXPRESS CARTAGE, INC.,
Defendants-Appellants, Cross-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 94 C 2561—Wayne R. Andersen, *Judge.*

ARGUED FEBRUARY 11, 1999—DECIDED JUNE 9, 1999 [1]

Before CUMMINGS, BAUER, and EVANS, *Circuit Judges.*

EVANS, *Circuit Judge.* The defendants, primarily attacking with broad constitutional principles, are here con-

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[1] Judge Cummings participated in the consideration of this case, but he died before the decision was rendered.

testing a huge bill they received in this ERISA case. The plaintiffs not only defend the big bill but seek to jack it up a tad or two. We start by introducing the parties and explaining the intricacies of their claims and defenses.

Midwest Motor Express, Inc. and its affiliates, MME, Inc., Midnite Express, Inc., and Express Cartage, Inc. (collectively Midwest), withdrew from the Central States, Southeast and Southwest Areas Pension Fund (Central States) in April 1994. Central States then sued Midwest under the Employment Retirement Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*, as amended by the Multiemployer Pension Plan Amendments of 1980 (the MPPAA), *id.* § 1381 *et seq.*, for withdrawal liability of about $2.5 million dollars. On cross-motions for summary judgment the district court sided with Central States. Midwest appeals, arguing that the district court lacked subject matter jurisdiction and, more boldly, that imposition of retroactive withdrawal liability (to the tune of about $1.8 million of the total) amounts to an unconstitutional taking and a violation of economic substantive due process. Central States cross-appeals, arguing that the district court had jurisdiction over its ERISA claims but that Midwest had waived its constitutional claims, which, Central States urges, should be denied if they are to be heard at all, and that the district court erred in several technical determinations about the damages.

Midwest, a North Dakota trucking corporation, participated in the Central States pension plan from 1958 to 1994. Central States is a multiemployer pension plan that provides pension benefits to employees whose employers have collective bargaining agreements with the International Brotherhood of Teamsters. In a multiemployer pension plan, trustees appointed by the parties to the union contracts, advised by actuarial experts, set the level of contributions that employers must pay. The trustees also

set a certain level of benefits to be paid to employees if they remain employed for specified periods. Central States is administered by eight trustees, four from management and four from the Teamsters.

Midwest began contributing to Central States in 1958 and made all required contributions until it withdrew in 1991. Until 1990 Midwest dealt with Central States through Regional Carriers, Inc., an association of trucking employers that Midwest made its agent for collective bargaining with the Teamsters. Midwest never appointed its own trustee to the Central States board of trustees but was represented by the management trustees appointed by Regional Carriers. In 1990 Midwest withdrew from Regional Carriers in order to negotiate a separate, single-employer agreement with the Teamsters. One of the contested issues was whether to continue to participate in the Central States plan from which Midwest wished to withdraw. The contract negotiations were not successful. Unionized Midwest employees struck in August 1991. Negotiations continued, but in October 1991 Midwest legally hired permanent replacements for some of the strikers. In April 1994 Midwest's employees decertified the Teamsters as their representative and the strike ended. The decertification also ended Midwest's obligation to contribute to Central States.

The statutory framework governing relations between the parties is the MPPAA, an amendment to ERISA. ERISA was enacted in 1974 to protect employee pensions from termination because of underfunding among other risks. "Congress wanted to guarantee that if a worker has been promised a defined pension benefit . . . [which had vested] he will actually receive it." *Concrete Pipe and Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 607 (1993) (internal citations omitted). Initially, under ERISA, multi-

employer plans were only guaranteed at the discretion of the Pension Benefit Guaranty Corp. (PBGC), determinations about payouts being made on a case-by-case basis. 29 U.S.C. § 1381(c)(1) (superseded). After 1978 the guarantees were to be mandatory. *Id.* § 1381(c)(2) (superseded). Employers withdrawing from an ongoing multiemployer plan in that period thus incurred a contingent liabiltiy. Congress, however, became concerned about the stability of multiemployer plans and the cost of the guarantee. It determined that "the possibility of liability upon termination of a plan created an incentive for employers to withdraw from weak multiemployer plans." *Concrete Pipe*, 508 U.S. at 608 (1993). Congress enacted the MPPAA to remedy this situation.

The main relevant features of the MPPAA are that (1) it created mandatory withdrawal liability for withdrawing employers, who must immediately begin to pay a fixed debt to the plan in which they had participated, *Pieck v. Pension Benefit Guaranty Corp.*, 724 F.2d 1247, 1255 (7th Cir. 1983); 29 U.S.C. § 1381(a); (2) the liabiilty is for a proportionate share of the plan's unfunded vested benefits, *id.* § 1381(b) and § 1391 (methods of computing withdrawal liability); *Concrete Pipe*, 508 U.S. at 609; and (3) the MPPAA has a retroactive aspect, since the withdrawal liability "imposes on the withdrawing employer a share of the unfunded vested liability proportional to the employer's share of contributions to the plan during the years of its participation," *Concrete Pipe*, 508 U.S. at 610, even if the "years of its participation" in the plan preceded the effective date of the MPPAA [2] or the enactment of ERISA itself.

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[2] The MPPAA is also retroactive in another way not relevant here. *See* 29 U.S.C. § 1461(e)(2)(A) (making the effective date of the statute 5 months prior to its enactment in order to discourage strategic withdrawals during congressional debate during that

On April 26, 1994, Central States issued an assessment of withdrawal liability and a demand for payment in the amount of $2,546,439.39, listing Midwest's "pre-1980 pool liability" as $1,814,856.36 and its "post-1979 pool liability" as $731,582.94. The "pre-1980 pool liability" is the retroactive withdrawal liability imposed by the MPPAA, effective from 1980, the year specified in the amendment. On the same day that Central States issued the assessment and demand for payment (April 29, 1994) Central States sued Midwest on this liability in the United States District Court for the Northern District of Illinois. Midwest received that notice and demand on the following day. In May Midwest sued Central States in federal district court in the District of North Dakota, seeking a declaration that the assessment of retroactive withdrawal liability was unconstitutional and that any collection should be enjoined. The case was transferred to the Northern District of Illinois on Central States' motion. Midwest appealed the transfer to the Eighth Circuit, which affirmed, and to the Supreme Court, which denied certiorari. Midwest agreed in September 1996 to make interim payments of $31,000 a month, which it has done.

Midwest requested arbitration in October 1994, and the parties agreed that the arbitrator would answer stipulated factual questions. Midwest does not contest the actuarial soundness of the assessment or the amount in question, but only whether Midwest can be constitutionally held to any retroactive withdrawal liability. The arbitrator's decision and award of May 20, 1997, made the following findings: (1) Midwest is a pre-ERISA employer, that is, its participation in Central States, beginning in 1958, ante-

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period). The constitutionality of this provision was upheld against a substantive due process challenge in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984).

dates the enactment of ERISA in 1974; (2) Midwest's withdrawal from Central States was involuntary; (3) Central States is a defined benefit pension plan covered by Title IV of ERISA rather than a defined contribution plan, and while it is not a hybrid Taft-Hartley pension plan within the meaning of ERISA, it is a "hybrid plan" in the sense intended in Justice O'Connor's concurrence in *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 232-236 (1986); and (4) that Midwest had little, but some, control over the benefit and contribution levels and other factors that produced unfunded vested benefits from 1973 to Midwest's withdrawal in 1991.

Against this background, the district court decided cross-motions for summary judgment in favor of Central States. The parties cross-appeal as explained. We review a district court's grant of summary judgment *de novo*, applying the same standards as the court below and viewing the record and all reasonable inferences to be drawn from it in the light most favorable to the nonmoving party, *Fulk v. United Transp. Union*, 160 F.3d 405, 407 (7th Cir. 1998). Summary judgment is appropriate if there are no genuine issues of material fact in dispute. *Mills v. Health Care Serv. Corp.*, 1999 WL 144274 at *1 (7th Cir. Mar. 17, 1999); Fed. R. Civ. P. 56(c). An arbitrator decides facts by a preponderance and his findings of fact may be set aside only if clearly erroneous. *See Jos. Schlitz Brewing Co. v. Milwaukee Brewery Workers' Pension Plan*, 3 F.3d 994, 999 (7th Cir. 1993) (interpreting 29 U.S.C. § 1401(c)).[3] The same standard holds for the arbitrator's application of law to fact. *Id.*; *Chicago Truck Drivers Pension Fund v. Louis Zahn Drug*

[3] The substantive law of the case was affirmed on review in *Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co.*, 513 U.S. 414 (1995), but the Supreme Court did not reach the issue of the statutory standard of review.

Co., 890 F.2d 1405, 1409-1411 (7th Cir. 1989). The arbitrator's legal conclusions are subject to *de novo* review. *Id.; Trustees of Iron Workers Local 473 Pension Trust v. Allied Products Corp.*, 872 F.2d 208, 211-212 (7th Cir. 1989).

Each party raises questions about whether any federal court may hear the arguments of the other side. Because Central States sued before Midwest defaulted on the withdrawal liability assessment, indeed before Midwest had even received the assessment and demand for payment, Midwest contends that Central States' claim is not ripe. The Eighth Circuit rejected this argument, *see Midwest Motor Express, Inc. v. Central States Southeast and Southwest Area Pension Fund*, 70 F.3d 1014, 1017 (1996), and we concur. Here Midwest attempts to play a double game, conceding in its declaratory judgment action as plaintiff the premise that would make Central States' action ripe, *i.e.*, that Midwest believes that it has no retroactive withdrawal liability and therefore need not pay, while arguing in Central States' MPPAA action as defendant that this very predicate was not established. A litigant may not take away with one hand what it gives with the other. *See DeGuiseppe v. Village of Bellwood*, 68 F.3d 187, 191 (7th Cir. 1995) (judicial estoppel "prevents a party who has successfully taken a position in one litigation from taking the opposite position in a subsequent litigation"). Having prevailed on the jurisdictional issue there, which is how it came to lose on the merits here, Midwest cannot now say that federal jurisdiction is wanting.

Furthermore, even if there were jurisdictional problems when Central States filed its initial complaint, Central States remedied them when it filed a second amended complaint, by which time Midwest was clearly refusing to

pay. *See Ford v. Neese,* 119 F.3d 560, 563 (7th Cir. 1997) (jurisdictional defects can be cured by amending complaint).

For its part, Central States argues that Midwest waived the challenge by not raising it in arbitration. Any objection to an MPPAA withdrawal liability assessment not raised by the employer in the arbitration is waived. *See Central States, Southeast & Southwest Areas Pension Fund v. Slotky,* 956 F.2d 1369, 1372 (7th Cir. 1992). In the instant case, however, the parties agreed in 1996 that they would develop only the facts of the case at arbitration. The arbitrator specifically declared that by stipulation of the parties he would not address any legal issue, and the district court knew all along that Midwest was simply holding off on its constitutional challenge until after the arbitration. Therefore, Midwest did not waive its constitutional challenge to withdrawal liability.

Central States also contends that Midwest's constitutional challenge is time-barred because Midwest failed to file suit in district court to "enforce, vacate, or modify the arbitrator's award" within 30 days as the MPPAA requires. *See* 29 U.S.C. § 1401(b)(2). The district court, however, correctly found that Midwest is not suing to "enforce, vacate, or modify the arbitrator's award" because the arbitrator's decision did not address the constitutionality of the statute. And even if Midwest were time-barred from raising its constitutional challenge as a plaintiff, the 30-day limit does not bar Midwest from raising these claims as a defense when it is sued by Central States. Both parties may therefore be heard in federal court. We proceed to the merits.

Midwest's central argument on appeal is that the MPPAA as applied is unconstitutional because it violates substantive due process. As the district court put it, a

party challenging an economic regulation on substantive due process grounds faces "an uphill climb." This may be a bit of an understatement. The courts review economic regulations with a strong presumption of constitutionality. The challenger must show that a legislature has acted in an arbitrary and irrational way. *See Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). Congress, of course, is not obligated to choose the legislative scheme that a reviewing court would find to be the best or fairest means to the legislative end, but simply one that is rationally related to that end. *See National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 477 (1985). The Supreme Court has not invalidated any economic regulation on substantive due process grounds since 1938, and we have remarked that it "may be right" that "merely 'economic' regulations can never flunk the test of rationality." *Central States, Southeast & Southwest Areas Pension Fund v. Lady Baltimore Foods, Inc.*, 960 F.2d 1339, 1343 (7th Cir. 1992).

Midwest argues that the MPPAA violates its substantive due process rights because the statute imposes a retroactive liability that Midwest never agreed to assume and never could have anticipated. But even where, as here, a question of retroactivity is involved, "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and . . . the burden is on the one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *In re Gifford*, 688 F.2d 447, 453 (7th Cir. 1982) (*en banc*) (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)); *see also Brach v. Amoco Oil Co.*, 677 F.2d 1213, 1224-1225 (7th Cir. 1982). Economic regulation will be upheld, even without any express findings or legislative history,

if there is "any reasonably conceivable state of facts that could provide a rational basis" for the legislation. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

With the MPPAA, Congress has set forth its reasons in detail. "The purpose [of imposing withdrawal liability on a withdrawing employer] is to relieve the funding burden on remaining employers and to eliminate the incentive to pull out of a plan which would result if liability were imposed only on a mass withdrawal by all employers." H.R. Rep. No. 96-869, at 67, *reprinted in* 1980 U.S.C.C.A.N. 2918, 2935. In view of this clearly legitimate aim, we cannot say that the scheme is irrational or arbitrary. The means chosen by [Congress are] " reasonably adapted to the end permitted by the Constitution.' It is not for us to say whether the means chosen by Congress represent the wisest choice." *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 758 (1982) (internal citations omitted). Finally, the Supreme Court has repeatedly held that the MPPA is constitutional on its face. *See Concrete Pipe*, 508 U.S. at 646-647; *Connolly*, 475 U.S. at 228.

That would normally more than end the matter, but Midwest cites Justice O'Connor's concurrences in *Connolly*, 475 U.S. at 228 (joined by Justice Powell), and *Concrete Pipe*, 508 U.S. at 647. Justice O'Connor emphasized that the issue of whether the MPPA might be defeated in an "as applied" challenge was not resolved in either case:

> [T]he Court's opinion should not be read to imply that employers may be subjected to retroactive withdrawal liability simply because "pension plans [have] long been subject to federal regulation." Surely the employer that joined a multiemployer plan before ERISA had been promulgated--before Congress made employers liable for unfunded benefits—might

have a strong constitutional challenge to retroactive withdrawal liability.

Concrete Pipe, 508 U.S. at 649 (O'Connor, J., concurring). Justice O'Connor envisions a case where there is absolutely no rational connection between conduct by the employer and the detriment to pension beneficiaries that Congress is trying to avoid. In general, pension plans fall into two categories: defined benefit plans and defined contribution plans. MPPAA imposes withdrawal liability only on employers participating in defined benefits plans. Essentially, the Act treats the defined benefits as promises for which the employer is responsible.

The problem is that many multiemployer plans like the one in the instant case have both defined contributions and defined benefits. Employers like Midwest and their unions bargain for a specified level of contributions by the employer. But neither the employer nor the union has a direct say in determining the level of benefits. The plan trustees (appointed equally by the employers and the union) determine the level of benefits according to actuarial assessments of the plan's value and future performance. When these assessments are too conservative, the plan ends up with a surplus that can be applied to future benefits. When the assessments are too optimistic, unfunded benefits result.

Who should be responsible for the unfunded benefits? Congress has said through the MPPAA that withdrawing employers are responsible for their proportionate share of existing unfunded benefits when they leave. Justice O'Connor is concerned that in some cases the connection between the actions of a given employer and the unfunded benefits can be so attenuated that holding them liable for it could amount to an arbitrary, irrational action by Congress.

The issue in the instant case, then, is whether holding Midwest responsible for a proportionate share of the unfunded benefits is irrational. Multiemployer plans like the one at issue here try to be all things to all people. They promise employers that they will only have to pay specified contributions, and they promise employees defined benefits. Because performance predictions cannot be perfect, there will always be shortfalls and surpluses. Inevitably, someone is not going to get what they expected out of the plan. Congress has decided that protecting employee pension benefits is more important than respecting the expectations of employers. Placing the burden of protecting the employee benefits on withdrawing employers may not be the wisest or even the fairest course of action. Congress could have decided to insure pension plans with taxpayer dollars, for example. Imposing withdrawal liability on Midwest is, however, a perfectly reasonable means of securing Congress' legitimate legislative goal of protecting the pension benefits of the Central States beneficiaries. Considering the extremely deferential view that a majority of the Supreme Court still takes toward economic regulation, Midwest's substantive due process argument must fail.

A somewhat more promising basis for a constitutional challenge to economic regulation is provided by the Takings Clause: "[N]or shall private property be taken for public use without just compensation." U.S. Const. amend. V, cl. 5. *See National Paint & Coatings Ass'n v. City of Chicago,* 45 F.3d 1124, 1130 (7th Cir. 1995). Midwest relies upon the Supreme Court's plurality opinion in *Eastern Enterprises v. Apfel,* 118 S. Ct. 2131 (1998), striking down an employer's liability for health benefits for former employees under the Coal Act. The challenged legislation, as applied to that employer, was an unconstitutional taking because it "impose[d] severe retroactive

liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability [was] substantially disproportionate to the parties' experience." *Eastern Enterprises,* 118 S. Ct. at 2149. Midwest claims that the MPPAA as applied to itself is an unconstitutional taking for the same reasons.

We evaluate the Takings Clause challenge under the standards for a "regulatory" taking rather than a permanent physical occupation of real property. The Supreme Court applied a "regulatory takings" analysis to ERISA in *Concrete Pipe,* 508 U.S. at 643-644, and *Connolly,* 475 U.S. at 224-225. The Court eschews a set formula for identifying a regulatory taking, looking instead to the particular facts of the case. *Id.* at 224. The Court has, however, identified three factors as being of "particular significance": (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action". *Id.* at 224-225; *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 124 (1978). *Eastern Enterprises* does not modify this traditional approach or suggest a different test. *See* 118 S. Ct. at 2149 ("We . . . apply[ ] the three factors that traditionally have informed our regulatory takings analysis."). Applying the same analysis, we reach a different result here.

Midwest stakes its claim on the first factor in the traditional analysis," "substantial economic impact." Although Midwest asserts that it satisfies all three conditions, it only really argues that the first applies. Arguments not developed in any meaningful way are waived. *See Bratton v. Roadway Package Sys., Inc.,* 77 F.3d 168, 173 n.1 (7th Cir. 1996). We do not address here whether a failure to make a showing under all three

factors would doom a regulatory takings claim, but since Midwest fails to carry its burden under any of them, including the one it actually argues, its challenge must certainly fail.

The Supreme Court uses a two-step analysis of "substantial economic impact" in retroactive liability cases. The first is whether there is a "considerable financial burden." *Eastern Enterprises*, 118 S. Ct. at 2149. It is not evident that Midwest has cleared this bar. While the roughly $1.8 million in challenged liability is a lot of money, for some firms that sum would not involve a considerable financial burden. The loss at issue must be compared to something in order to assess its impact—the net worth of the company or its total payments under the plan might be good places to start. Midwest, however, has not done this.

The second step in assessing whether there is "substantial impact" is to examine whether the liability imposed is out of proportion "to [the employer's] experience with the plan." *Eastern Enterprises*, 118 S. Ct. at 2149 (quoting *Connolly*, 475 U.S. at 226; *Concrete Pipe*, 508 U.S. at 645). Here, Midwest's reliance on *Eastern Enterprises* is misplaced. In that successful Takings Clause challenge to retroactive liability under the 1992 Act, the employer ceased its coal mining operations in 1965 and "[its] obligations under the Act depend[ed] solely on its roster of employees some 30 to 50 years before the statute's enactment, without any regard to responsibilities that Eastern had accepted under any benefit plan the company itself adopted." *Eastern Enterprises*, 118 S. Ct. at 2150. In contrast, Midwest, like the employers who unsuccessfully challenged the MPPAA in *Concrete Pipe* and *Connolly*, remained in business throughout the entire period in question, "voluntarily negotiated and maintained a pen-

sion plan which was determined to be within the strictures of ERISA," *id.* at 2149 (internal citations omitted), and its obligations depend on its employment roster both before and after the enactment of the challenged provision.

The Supreme Court has stated that participation in a defined ERISA benefit plan in *Connolly* and *Concrete Pipe* made the employers' liability proportionate to their experience with the plans because, in virtue of that participation, "the statutory liability was linked to the employers' conduct." *Eastern Enterprises,* 118 S. Ct. at 2150. In some extraordinary case there may be an exception to this rule, but Midwest has not shown that this is such a case. The fact that Midwest's pre-1979 retroactive liability is about two and a half times its post-1980 prospective liability does not suggest substantial disproportionaliy. That retroactive liability was incurred over a period about one and a half times as long as the period in which it acquired its prospective liability. The relevance of the fact that Midwest's retrospective liability is a higher proportion of its contributions to the Central States fund than its prospective contributions is unclear. Midwest cites no authority suggesting that such a ratio indicates "substantial disproportionality." Midwest's challenge thus fails under the traditional test.

Finally, Midwest again invokes Justice O'Connor's *Connolly* and *Concrete Pipe* concurrences, here to argue for an unconstitutional taking rather than a substantive due process violation. Midwest in effect asks us to adopt these concurrences as the law of regulatory takings in this circuit. We decline, in part to avoid complicating a difficult area of law and in part because it would make no difference if we did. Imposing retroactive withdrawal liability upon Midwest would not violate Justice O'Connor's concerns. First, there existed the "basis in the em-

ployer's conduct that would make it rational to treat the employees' expectations of benefits under the plan as the employer's responsibility," *Concrete Pipe*, 508 U.S. at 647 (O'Connor, J., concurring) (quoting *Connolly*, 475 U.S. at 229) (same)). The district court found that Midwest exercised enough control or influence over the course of events by provoking the strike and lawfully replacing unionized employees, precipitating the process which led to Midwest's involuntary withdrawal from the Central States pension plan. Reviewed as a factual causal claim or an application of law to fact, this is not clearly erroneous, *see Jos. Schlitz Brewing Co.*, 3 F.3d. at 999 (standard of review); even reviewed *de novo* as a legal claim, "given the heavy burden of showing [a statute] to be unconstitutional," the district court's finding is correct. *Turner Elkhorn Mining Co.*, 428 U.S. at 44.

Second, the occurrence of the unfunded vested liability was not "a result of events over which an employer has no control," *Connolly*, 475 U.S. at 234 (O'Connor, J., concurring). The district court, following the arbitrator, found that Midwest had some control over benefit levels, contribution rates, or other factors that produced unfunded vested benefits liability. Since Midwest agreed to the promised pension benefit levels, ratified the decisions of the Central States trustees, and was represented on the Central States board through the employers' association, this finding is not clearly erroneous. Midwest cannot succeed even under Justice O'Connor's concurrence.

Central States, for its part, has two quibbles about the damage award. The first concerns the interest rate Midwest should pay on its contributions. Under the statute, Midwest should be charged the rate "provided under the plan." 29 U.S.C. § 1132(g)(2). The plan was amended in 1997 to increase the interest rate by two points. The

district court found that, because Midwest withdrew from the plan in 1994, it should not have to pay the higher rate. This is perfectly reasonable. Central States objects that in the various collective bargaining agreements Midwest had prospectively ratified "all actions . . . to be taken by the [Central States] Trustees within the scope of their authority," but does not explain how the trustees were authorized to act for Midwest in any way after its withdrawal from the plan.

The second quibble concerns an offset or reduction in the judgment for Central States. The district court ordered Central States to release, in accordance with its agreement with Midwest, certain liens it held on real estate owned by Midwest that secured the outstanding balance of the contested withdrawal liability. Central States refused to comply, and the district court held that Midwest should accordingly be credited about a month's interest on the amount of the liens that should have been released ($547,000 at the prime rate). The district court also awarded Midwest attorneys fees of $12,093.26 and costs connected with litigation over the release of the liens.

These adjustments are entirely justified, and it is hard to see why Central States appeals them. Central States complains that Midwest had not shown that it was damaged by the refusal to release the liens, but the real point is that Central States was not damaged by the award of the month's interest, since it retained the valuable liens for that period. Moreover, Central States escaped the potentially serious sanctions it might have faced for refusing to obey a court order to release the liens. To have to pay a month's interest on their value and to have to reim-

burse Midwest for its attorneys fees and costs in connection with that refusal is getting off easy.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 94 C 2561

CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,
a pension trust, and HOWARD MCDOUGAL, trustee,
Plaintiffs,

v.

MIDWEST MOTOR EXPRESS, INC.
MME, INC., MIDNITE EXPRESS, INC.
and EXPRESS CARTAGE, INC.,
North Dakota corporations,
Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiffs bring this action under the Employment Retirement Security Act of 1974, ("ERISA"), 29 U.S.C. § 1001 et seq., as amended by the Multiemployer Pension Plan Amendments Act of 1980 (the "MPPAA"), 29 U.S.C. § 1381, et seq. Plaintiffs, Central States, Southeast and Southwest Areas Pension Fund ("Central States") and Howard McDougall, seek to collect withdrawal liability payments from Defendants, Midwest Motor Express, Inc., MME, Inc., Midnite Express, Inc., and Express Cartage, Inc. (collectively "Midwest"), under the terms of the MPPAA. Midwest contends that the MPPAA, as

applied, violates the Due Process Clause of the Fifth Amendment of the United States Constitution.

Currently before the Court are the parties' cross-motions for summary judgment. Plaintiffs assert that the Court should affirm the withdrawal liability assessment in the principal amount of $2,546,439.30. Although it is well settled that the MPPAA is constitutional on its face, Defendants claim that the instant case raises a matter of first impression in an "as applied" constitutional challenge because it joined Central States before Congress enacted ERISA. For the reasons set forth below, Plaintiffs' motion for summary judgment is granted and Defendants' motion is denied.

I. *BACKGROUND*

The following facts, primarily taken from the parties' 12(m) and 12(n) statements, are undisputed unless otherwise noted. Central States is a multiemployer pension plan. Howard McDougall is one of Central States' trustees. Midwest Motor Express, Inc. is a North Dakota corporation. MME, Inc., Midnite Express, Inc., and Express Cartage, Inc. are trades or businesses under Midwest's control. Midwest began contributing to Central States in 1958 and continued to contribute to the plan until it withdrew in 1991. Midwest signed various Trust Agreements with Central States governing its participation in the plan.

In a multiemployer pension plan, multiple employers contribute to a single pension fund based on one or more collective bargaining agreements. Central States provides pension benefits to participants employed by the employers that have entered into collective bargaining agreements with the International Brotherhood of Teamsters Union (the "Teamsters").

The parties to a collective bargaining agreement set the level of contributions that employers, such as Midwest, are required to pay to Central States. The employer contributions are pooled in one fund and the individual employee-participants do not have separate benefit accounts. Rather, plan participants are promised certain benefits if they achieve the periods of covered employment defined in the plan documents. Thus, Central States is a defined benefit pension plan.

Eight trustees jointly administer Central States, four appointed by management representatives and four appointed by union representatives pursuant to the Taft-Hartley Act, 29 U.S.C. § 186(c)(5). The Trustees determine the level of benefits paid to participants and beneficiaries. Actuaries advise the Trustees on appropriate benefits levels in light of the plan's assets and income. The actuaries also determine the level of contributions necessary to support the benefits disbursed.

The value of the benefits promised to employees is the principal liability of Central States. Central States' vested benefits were valued at $7.206 billion in 1980 and at $12.979 billion in 1991. The assets of Central States have grown from $2.970 billion in 1980 to $11.801 billion in 1991. In 1980 Central States' unfunded vested benefits were $3.744 billion, but by 1991, the unfunded vested benefits were reduced to $1.764 billion.

During the years of Midwest's participation in Central States, the Trustees agreed several times to increase the amount of benefits paid to employees and the level of employer contributions increased several times pursuant to collective bargaining agreements.

Midwest belonged to Regional Carriers, Inc., a regional association of trucking industry employers that conducted

multiemployer bargaining with the Teamsters. Midwest appointed Regional Carriers, Inc.. as its agent for collective bargaining. Midwest never appointed its own trustee to the Central States Board of Trustees. Rather, Midwest was represented by management trustees appointed by employer associations.

In late 1990, Midwest withdrew from Regional Carriers, Inc. for the express purpose of negotiating a separate 1991-1994 contract as a single employer. Accordingly, Midwest and the Teamsters commenced negotiations for a contract solely between Midwest and the Teamsters. On August 1, 1991, Midwest presented an initial contract offer to the Teamsters. Although Midwest employees went on strike on August 12, 1991, negotiations continued. In October 1991, Midwest legally hired permanent replacements for some of the strikers. On April 15, 1994, the National Labor Relations Board certified Midwest's employees decertification of the Teamsters and the strike ended. Midwest did not participate in the employees' decertification decision.

Between 1958 and 1991, Midwest made all of its required contributions to Central States. Midwest's contribution obligation permanently ceased on April 15, 1994, the day the strike ended. On April 26, 1994, Central States issued to Midwest a notice of assessment of withdrawal liability and a demand for payment of $2,546,-439.30. The notice and demand listed Midwest's "pre-1980 pool liability" as $1,814,856.36 and its "post-1979 pool liability" as $731,582.94.

On April 26, 1994, Central States filed suit against Midwest to collect the withdrawal liability in the United States District Court for the Northern District of Illinois. Midwest received Central States' notice and demand on April 27, 1994.

In May 1994, Midwest filed suit against Central States in the United States District Court for the District of North Dakota requesting a declaration that the withdrawal liability was unconstitutional and seeking to enjoin Central States from collecting any interim withdrawal liability payments. Central States moved to transfer venue to the Northern District of Illinois. The motion was granted. The Eighth Circuit Court of Appeals affirmed the transfer and Midwest unsuccessfully petitioned the United States Supreme Court for certiorari.

Midwest requested arbitration on October 4, 1994. On September 24, 1996, the parties agreed that Midwest would make interim payments of $31,000 per month. Midwest has made all required monthly payments.

Arbitrator Malcolm Pritzker held hearings on January 14-15, 1997. The parties agreed that Arbitrator Pritzker would answer certain stipulated factual questions. Midwest never disputed the actuarial soundness of the withdrawal liability assessment. Instead, Midwest claimed that the withdrawal liability is unconstitutional as applied and, therefore, it owes nothing. Accordingly, at the hearing Midwest offered no testimony to dispute the amount of the withdrawal liability claimed by Central States. In addition, Midwest offered no evidence to quantify the amount of any withdrawal liability attributable to Midwest's pre-ERISA, i.e., pre-1974, participation in Central States. Midwest also proffered no evidence to quantify any alleged impact that the benefits increases had on Midwest's withdrawal liability or Central States unfunded vested benefits level generally.

Arbitrator Pritzker issued his Decision and Award on May 20, 1997 finding that:

1. Midwest is a pre-ERISA employer in that it started to participate in the Central States Pen-

sion Fund in 1958 well prior to the passage of ERISA in 1974. Midwest continued to participate in the fund after the passage of ERISA until it withdrew from the fund.

2. Midwest's withdrawal from Central States was involuntary.

3, 5, 5A, 5B. Central States is not a hybrid Taft-Hartley pension plan within the meaning of ERISA or a defined contribution plan. Central States is a defined benefit pension plan and is therefore covered by Title IV of ERISA. Central States is a hybrid plan as that phrase is used by Justice O'Connor in *Connolly* [*v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 232-236 (1986) (O'Connor, J., concurring].

4. Midwest had little but some control over the level of contributions, the degree of benefits or other factors that produced unfunded vested benefits for Central States from the period of 1973 to the time [sic] Midwest's withdrawal from Central States.

6. On the basis of the Record before me, it is impossible to conclude that benefit increases by Central States unduly added to Midwest's withdrawal liability.

(Arb. Op., p. 19).

Central States and Midwest now move for summary judgment. Midwest contends that the imposition of withdrawal liability under the MPPAA is unconstitutional as applied to its particular circumstances. Central States dis-

agrees and asserts that Midwest must pay the withdrawal liability in accordance with the MPPAA.

II. *DISCUSSION*

A. Standard Of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Salima v. Scherwood South, Inc.*, 38 F.3d 929, 932 (7th Cir. 1994). The moving party bears the burden of demonstrating an absence of evidence to support the position of the nonmoving party, *Doe v. R.R. Donnelley & Sons Co.*, 42 F.3d 439, 442-43 (7th Cir. 1994), and all reasonable inferences are drawn in favor of the party opposing the motion. *Associated Milk Producers, Inc. v. Meadow Gold Dairies, Inc.*, 27 F.3d 268, 270 (7th Cir. 1994). The Court, however, is "not required to draw every conceivable inference from the record [in favor of the non-movant]—only those inferences that are reasonable." *Bank Leumi Le-Israel, B.M. v. Lee*, 928 F.2d 232, 236 (7th Cir. 1991). To avert summary judgment the plaintiff must "do more than simply show there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The non-movant cannot rely solely on its pleadings and must come forth with evidence showing that a genuine issue of material fact exists for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

In making its determination, the court's sole function is to determine "whether there is any material dispute of

fact that requires a trial." *Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994). Credibility determinations and weighing evidence are jury functions, not those of a judge when deciding a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Even though the parties have filed cross motions for summary judgment, the court need not grant summary judgment for one side. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voight*, 700 F.2d 341, 349 (7th Cir. 1983), *cert. denied*, 464 U.S. 805 (1983); *Intermatic Inc. v. Toeppen*, 947 F. Supp. 1227, 1232 (N.D. Ill. 1996). The court must still assess whether a material fact question exists. *Id.*

The arbitrator's factual findings are presumed correct and are rebuttable only by a clear preponderance of the evidence. His resolution of "mixed questions of fact and law" are also entitled to deference. 29 U.S.C. § 1401 (c); *Central States, Southeast and Southwest Areas Pension Fund v. Cullum Co.*, 973 F.2d 1333, 1337 (7th Cir. 1992). We review the arbitrator's legal determinations de novo. *Id.*

B. Jurisdictional Issues

1. This Court Has Jurisdiction Over Central States' Lawsuit

Midwest rehashes its previously rejected argument that this Court lacks subject matter jurisdiction over Central States' lawsuit. Midwest asserts that Central States filed its lawsuit before Midwest refused to pay the withdrawal liability assessed in the notice and demand. Thus, Midwest contends that Central States' claims were legally nonexistent at the time it filed suit and, therefore, this Court

never acquired jurisdicton. The Eighth Circuit previously rejected this same argument and held that this Court had subject matter jurisdiction over Central States claims. The court held:

> Midwest thus asks this court to weigh the merits of the Illinois action in order to determine whether that forum has jurisdiction. But this is a non sequitur. 'A court may have jurisdiction over a case even though the case is one to which there is no merit. . . . The jurisdiction of the federal courts is dependent on the subject matter if the action or the status of the parties to it; it is not dependent on the merits of the case.'

Midwest Motor Express, Inc. v. Central States Southeast and Southwest Areas Pension Fund, 70 F.3d 1014, 1017 (8th Cir. 1996) (citing Charles A. Wright, Law and Federal Courts 31 (5th ed. 1994)), *cert. denied,* 116 S. Ct. 1704 (1996). Likewise, this Court similarly rejected Midwest's argument. (*See* Transcript of February 22, 1996 Hearing).

Moreover, Midwest's North Dakota lawsuit is currently before this Court and also concerns the propriety of the withdrawal liability assessed in the notice and demand issued by Central States. Neither party disputes that this Court has jurisdiction over the North Dakota action. Indeed, Midwest filed the North Dakota action *after* it received the notice and demand and *after* Midwest refused to pay its outstanding withdrawal liability by filing its own lawsuit challenging the constitutionality of the assessment. *See Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.,* 118 S. Ct. 542, 549 (1997).

Additionally, Midwest contends that Central States' action did not accrue until after the arbitrator issued his

decision. Midwest is wrong. Although arbitration under the MPPAA, 29 U.S.C. § 1401, is mandatory, the requirement is not a jurisdictional prerequisite. *McDonald v. Centra, Inc.*, 946 F.2d 1059, 1063 (4th Cir. 1991), *cert. denied*, 504 U.S. 968 (1992). Therefore, the Court will not dismiss Central States' claims for lack of subject matter jurisdiction.

2. Midwest's Challenge To The Withdrawal Liability Assessment Is Not Time Barred

Central States argues that Midwest's challenge to the withdrawal liability assessment is barred because Midwest did not file a timely challenge to the arbitrator's ruling. Under 29 U.S.C. § 1401(b)(2), either party may bring an action to enforce, modify, or vacate the arbitrator's award and any objections to the arbitartor's award are waived if not timely filed.

In its Second Amended Complaint, Central States added a claim to enforce and/or modify the arbitrator's award and Midwest filed its timely answer and affirmative defenses. Midwest is not challenging the arbitrator's award nor the actuarial propriety of the assessed withdrawal liability. Thus, Midwest did not have to file a pleading pursuant to 29 U.S.C. § 1401(b)(2) in order for this Court to have jurisdiction over Midwest's constitutional claim.

Furthermore, because Midwest challenges the constitutionality of the MPPAA as applied to its circumstances, the arbitrator was not asked to and did not reach the actuarial propriety of the withdrawal assessement. Rather, he made findings of fact to questions presented by stipulation of the parties. The arbitrator's award, therefore, provides the factual underpinnings to Midwest's constitutional claim. The arbitrator did not decide, nor could he

decide, the merits of Midwest's constitutional challenge to the withdrawal liability assessment. Thus, Midwest's constitutional claim is properly before this Court.

C. The MPPAA As Applied To Midwest

1. Background On The MPPAA

Congress enacted ERISA in 1974 to " 'ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in [them]. . . . Congress wanted to guarantee that if a worker had been promised a defined benefit pension upon retirement—and if he obtained a vested benefit—he would actually receive it.' " *Concrete Pipe and Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 607 (1993) (citation omitted). Initially, ERISA did not unconditionally guarantee multiemployer pension plans because Congress viewed multiemployer plans as more stable and secure than single employer plans. *Peick v. Pension Benefit Guaranty Corp.*, 724 F.2d 1247, 1252 (7th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984). Accordingly, multiemployer plans were guaranteed solely at the discretion of the Pension Benefit Guaranty Corporation ("PBGC") until January 1, 1978. "In the interim, the PBGC determined on a case-by-case basis whether it would pay a terminating plan's beneficiaries the difference between the value of their guaranteed benefits and the value of the plan's assets on the termination date." *Id.*

In the late 1970's, Congress determined that "the possibility of liability upon termination of a plan created an incentive for employers to withdraw from weak multiemployer plans." *Concrete Pipe*, 508 U.S. at 608. Based on its concern for the financial stability of multiemployer

plans, Congress requested that the PBGC investigate and report on multiemployer plans. *Id.* The PBGC suggested new rules that would require a withdrawing employer to pay its share of the plan's unfunded liabilities attributable to that employer's participation in the plan. *Connolly*, 475 U.S. at 216. In response, Congress enacted the MPPAA on September 26, 1980 but established April 29, 1980 as the effective date of its withdrawal liability provisions. 29 U.S.C. § 1461(e)(2)(A).

The MPPAA changed the rules governing an employer's withdrawal from a multiemployer plan. No longer did an employer's withdrawal "give rise, as it had under ERISA, to a contingent liability payable to the PBGC. Under [the] MPPAA, an employer who withdraws must immediately begin to pay a fixed and certain debt owed to the plan." *Peick*, 724 F.2d at 1255. The MPPAA provides that "[i]f an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in an amount determined under this part to be the withdrawal liability." 29 U.S.C. § 1381(a). A complete withdrawal from a multiemployer plan occurs "when an employer—(1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan." 29 U.S.C. § 1383. It is undisputed that Midwest's obligations to contribute to Central States permanently ceased when the employees of Midwest decertified the Teamsters.

When an employer, such as Midwest, withdraws from a multiemployer plan, it is liable for its proportionate share of the plan's unfunded vested benefits. 29 U.S.C. §§ 1381, 1391. The employer's share of the unfunded vested benefits is measured by the difference between the curent value of the plan's assets and the present value of

the vested benefits. The vested benefits are the "benefits that are currently being paid to retirees and that will be paid in the future to covered employees who have already completed some specific period of service." *Concrete Pipe*, 508 U.S. at 609 (citing 29 U.S.C. §§ 1053, 1381, 1391).

Under the MPPAA, the trustees of a multiemployer plan are responsible for determining whether an employer has withdrawn and, if so, determining the amount of the employer's withdrawal liability, notifying the employer of the amount of that liability, and collecting that amount from the employer. 29 U.S.C. § 1382. All disputes concerning the amount of an employer's withdrawal liability must be resolved through arbitration. 29 U.S.C. § 1401(a)(1). Because the withdrawing employer must "pay now and dispute later," the employer must make the contested withdrawal liability payment pending resolution of the dispute through arbitration. 29 U.S.C. § 1401(d); *see Bay Area Laundry and Dry Cleaning Pension Trust Fund*, 118 S. Ct. at 547. Any party to the arbitration may file an action in the appropriate district court to review the arbitrator's decision. 29 U.S.C. § 1401(b)(2).

2. Substantive Due Process Standard Of Review

The MPPAA is a classic example of an economic regulation, a legislative effort to structure and accommodate the burdens and benefits of economic life. *See Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. at 728; *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). A party challenging economic legislation on substantive due process grounds faces a difficult uphill climb. Indeed, since 1935 the Supreme Court has not invalidated any federal economic regulation on substantive due process grounds.

Because the MPPAA is an economic regulation that burdens no fundamental rights, it is subject to the minimum scrutiny, rational basis test. *R.A. Gray & Co.*, 467 U.S. at 729. "It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Id.; see also Usery*, 428 U.S. at 15. Although economic legislation must be rational and not arbitrary, Congress is not obligated to select a legislative scheme that a court would later find to be the fairest means to the legislative end, but simply one that is rational and not arbitrary. *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 477 (1985).

Moreover, legislation adjusting economic rights and burdens is not unlawful solely because it upsets otherwise settled expectations. This is true even if the legislation imposes a new duty or liability based on past acts. *R.A. Gray & Co.*, 467 U.S. at 729-730. Nonetheless, the retroactive aspects of the legislation must satisfy due process. *Id.* at 730. "The burden to justify retroactivity in economic legislation 'is met simply by showing that the retroactive application is itself justified by a rational legislative purpose.'" *Davon, Inc. v. Shalala*, 75 F.3d 1114, 1123 (7th Cir.) (quoting *R.A. Gray & Co.*, 467 U.S. at 730)), *cert. denied sub nom., Templeton Coal Co., Inc. v. Shalala*, 117 S. Ct. 50 (1996).

The main thrust of Midwest's argument is that the MPPAA is unconstitutional as applied because the statute imposes a retroactive liability that Midwest never agreed to assume and never anticipated. Midwest exclusively relies on Justice O'Connor's concurrences in *Connolly* and

Concrete Pipe in which she opined that the MPPAA *might* be unconstitutional as applied to certain employers. Significantly, other than Justice Powell who joined in the *Connolly* concurrence, no court has adopted the rationale contained in Justice O'Connor's concurrences. In any event, even if Midwest satisfied all of Justice O'Connor's criteria, it is uncertain that Justice O'Connor would find for Midwest.

Specifically, Midwest contends that its facts and circumstances address all of Justice O'Connor's concerns and "present the best constitutional argument available: The imposition of withdrawal liability under the MPPAA (1) on a pre-ERISA employer, (2) who had no contractual obligation to pay benefit levels, and (3) who had paid all its pension contributions, (4) for an involuntary withdrawal (5) from a hybrid Taft-Hartley Plan (6) where there has been no detriment to the participants and retirees, and (7) where the employer has little control over the level of contributions, the degree of benefits or other factors that produce unfunded vested benefits for the Plan, is so arbitrary and irrational as to violate the due process clause of the Fifth Amendment." (Def. Mem. in Support of SJ, pp. 3-4).

3. Involuntary Withdrawals

a. The MPPAA Applies To Involuntary Withdrawals

Arbitrator Pritzker held that Midwest's withdrawal from Central States was involuntary. (Arb. Op., pp. 14, 19). Thus, Midwest contends that "[i]t is contrary to the intent of Congress to require Midwest to pay withdrawal liability because Midwest itself took no action to effectuate the withdrawal from Central States." (Def. Mem. in Support of SJ, p. 16). Nonetheless, this fact offers no aid to Midwest because the MPPAA does not exempt involuntary withdrawals from liability.

First, we must examine the language of the statute, the most reliable indicator of Congressional intent. *Central States, Southeast and Southwest Areas Pension Fund v. Bell Transit Co.*, 22 F.3d 706, 710 (7th Cir. 1994). The court must ensure that the plain language of the statute is applied and not bypassed. *Id.* "Congress, not the courts, decides what rules and exceptions to those rules best achieve its goals." *Central States Southeast and Southwest Areas Pension Fund v. Bellmont Trucking Co., Inc.*, 788 F.2d 428, 433 (7th Cir. 1986). "The enumeration of specific exclusions from the operation of a statute is an indication that the statute should apply to all cases not specifically excluded." *In re Cash Currency Exchange.* 762 F.2d 542, 552 (7th Cir.), *cert. denied sub nom., Fryzel v. Cash Currency Exchange*, 474 U.S. 904 (1985).

Midwest admits that the language of the MPPAA is clear and unambiguous. A review of the MPPAA's provisions establishes that the statute contains no express exemption for involuntary withdrawals. The MPPAA, however, carves out specific exceptions to the generally applicable rule, 29 U.S.C. § 1381(a), imposing liability on an employer withdrawing from a pension plan. For example, 29 U.S.C. § 1398 precludes withdrawal liability if an employer ceases to exist due to specified changes in corporate structure or if an employer suspends contributions during a labor dispute. Other exceptions are listed in 29 U.S.C. §§ 1383(b)-(d) (exceptions for construction and entertainment industry) and 1384 (sale of assets). Because Congress has mandated no such exemption, the Court cannot carve out an exception for involuntary withdrawals or for withdrawals occasioned by the employees' decertification of their union. *See Kariotis v. Navistar Int'l Transp. Corp.*, 131 F.3d 672, 680 (7th Cir. 1997); *Bellmont Trucking Co.*, 788 F.2d at 433.

Correctly, Midwest does not contend that it meets any of the enumerated exceptions to withdrawal liability. Instead, Midwest asserts that because it did not "voluntarily" withdraw to gain economic advantage, but rather withdrew because its employees decertified the Teamsters, Congress intended no withdrawal liability. We disagree.

Midwest cites the testimony of several witnesses appearing before the pertinent House and Senate committees who urged lawmakers to tailor the MPPAA to regulate only *voluntary* withdrawals. For the same proposition, Midwest cites Senator Dole's statement that "it is imperative that this bill provide protections for employers, especially smaller employers, so that they will not be irreparably damaged by events over which they have no control." 126 Cong. Rec. 20181 (1980). Midwest, however, ignores the context of Senator Dole's statement. The Senator was not referring to involuntary withdrawals. Rather, he called for safeguards to ensure the proper calculation of the withdrawing employer's share of the unfunded vested benefits because "in many multiemployer plans it is impossible to trace the unfunded liability attributable to each employer. *Id.* Significantly, Midwest fails to cite any *Congressional* debate discussing any legislator's desire or requirement that involuntary withdrawals be exempted from liability.

The MPPAA's legislative history states that "[t]he primary purpose of the legislation is to protect retirees and workers who are participants in such plans against the loss of their pensions." H.R. REP. 96-869(I)a, reprinted in 1980 U.S.C.C.A.N. 2918, 2919. Moreover, "Congress was concerned not only with reducing incentives to withdraw from multiemployer plans, but also with offsetting 'the burden otherwise shifted to the remaining employers when a withdrawal nevertheless occurs.' " *Bellmont Trucking Co., Inc.*, 788 F.2d at 432 (rejecting employer's argu-

ment that the MPPAA did not apply to involuntary withdrawal caused by employer's bankruptcy). Additionally, Congress did not intend withdrawal liability to attach as a punishment for a withdrawing employer's malice or willfulness, but to protect the vested pension interests of the employees. *See* 29 U.S.C. § 1001(c). Indeed, "[i]f employers escaped liability merely because their withdrawals were involuntary, a major protective feature of the MPPAA would be undercut." *Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Bldg. Materials, Inc.*, 749 F.2d 1396, 1407 (9th Cir. 1984) (union forced withdrawal subjected employer to withdrawal liability), *cert. denied*, 471 U.S. 1054 (1985). When a withdrawing employer is assessed its withdrawal liability, the pension plan is essentially billing the employer for its fair share of the plan's under funding. "Congress therefore chose withdrawal liability as a means to both deter withdrawals and to make the employer liable for any damage caused by the withdrawal." *Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Indus. Pension Fund*, 762 F.2d 1124, 1130 (1st Cir. 1984).

Had Congress wanted to limit the reach of the MPPAA to voluntary withdrawals, such a restriction could have easily been included in the statute. Although Midwest relies on witnesses supporting liability exclusively for voluntary withdrawals, Congress did not. Simply put, nothing in the pertinent legislative history suggests that Congress intended to exclude involuntary withdrawals from the purview of the MPPAA. *See* H.R. Rep. No. 96-364 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2918. *Accord Thompson Bldg. Materials, Inc.*, 749 F.2d at 1407 (stating "at the outset we note that many, if not most, employer withdrawals are involuntary to some degree, but

no appellate court has found that factor relevant"); *Centennial State Carpenters Pension Trust Fund v. Woodworkers of Denver, Inc.*, 615 F. Supp. 1063, 1068 (D. Colo. 1985) (granting summary judgment for the pension plan even though the employer's withdrawal was occasioned by the employee's decertification of their union); *Pacific Iron & Metal Co. v. Western Conference of Teamsters Pension Trust Fund*, 553 F. Supp. 523, 526 (W.D. Wash. 1982) (the MPPAA does not exclude involuntary withdrawal due to employees' vote to decertify their union).

Congress also directed the PBGC to conduct a study and report on "the necessity of adopting special rules in cases of union-mandated withdrawal from a multiemployer pension plan." Multiemployer Pension Plan Amendments Act of 1980 § 412(a)(1)(B), Pub. L. 96-364 (codified at 29 U.S.C. § 1306). The Report defined union mandated withdrawals as "an event that is triggered by a union's conduct." (Union-Mandated Withdrawal Study Report, submitted by the Pension Benefit Guaranty Corporation, March 1991, hereinafter "Report," p. 11). Although union conduct did not trigger Midwest's withdrawal, the report is instructive on the MPPAA's treatment of involuntary withdrawals.

The Report notes that "[a]llowing all 'involuntarily' withdrawing employers to escape liability, in whole or in part, shifts the consequences of underfunding solely onto other employers and participants. Remaining employers would be forced to carry added funding burdens themselves, a fact that could create serious economic hardships and eventually force more employer withdrawals." (Report, pp. 10-11). Additionally, the Report states that withdrawal liability serves to protect "the financial integrity of multiemployer plans." Consistent with this purpose, Con-

gress chose in 1980 to base the general withdrawal liability rules on events that normally result in a loss of the plan's contribution base and potentially harm the plan's integrity, rather than to make rules that were based on fault or subjective factors." (Report, pp. 18-19). The PBGC recommended that the Congress make no statutory modifications to accommodate union mandated withdrawals. (Report, p. 25). Consistent with the Report, Congress has not amended the MPPAA to exempt union mandated withdrawals from withdrawal liability.

Thus, we conclude that Congress did not intend to exempt from the MPPAA employers, such as Midwest, that withdraw from a pension plan because their employees decertify their union. Furthermore, based on the MPPAA's express purpose and the legislative history, we find that Congress' decision to impose liability on employers for voluntarily and involuntarily withdrawals is rational and not arbitrary.

b. The MPPAA As Applied To Midwest Is Constitutional Even Though Its Withdrawal Was Involuntary

Midwest also contends that imposition of withdrawal liability violates its due process rights because it had no control over the union decertification which caused Midwest's wthdrawal. Although Arbitrator Pritzker specifically held that Midwest's withdrawal from Central States was involuntary, (Arb. Op. pp. 14, 19), he did not discuss the chain of events leading up to decertification. Moreover he expressly "[l]eft to the Court the issue not before me of whether [Midwest's] conduct in this case falls within the employer's conduct described by Justice O'Connor in *Connolly*, [475 U.S. at 229] when she wrote: " '. . . the imposition of retroactive liability on employers for the benefit of employees may be arbitrary and irra-

tional in the absence of any connection between the employer's conduct and some detriment to the employee,' " (Arb. Op., p. 14). Thus, we now turn to the facts and circumstances leading to the decertification of the Teamsters.

Although the underlying facts are uncontested, the parties dispute whether, as a matter of law, Midwest had sufficient control over the events culminating in the decertification to withstand Midwest's constitutional challenge. Midwest did not, and could not, directly participate in the decertification decision. Nevertheless, as a matter of law, we find that Midwest exercised sufficient influence and control over the chain of events that culminated in the decertification.

In late 1990, Midwest chose to leave its employer association and negotiate a contract on its own with the Teamsters. Although the negotiations continued, Midwest's employees went on strike. Midwest's offers and tactics during the ensuing negotiations likely led to, or perhaps prolonged, the strike. Moreover, Midwest hired the replacement workers that, through no action of Midwest, chose to decertify the Teamsters. Midwest also refused to displace the permanent replacement workers for the striking employees, a significant issue for the Teamsters. (Arb. Op., p. 4).

Furthermore, regardless of the reason Midwest withdrew from Central States, Midwest's failure to pay its fair share of unfunded vested benefits would force the employers remaining in the plan to shoulder an extra burden. This result is contrary to the express purpose of the MPPAA. 29 U.S.C. §§ 1001(c), 1001a(c).

We agree with Midwest that its withdrawal from Central States was involuntary in that the decertification

caused Midwest's contribution obligation to cease. Nonetheless, because, as a matter of law, Midwest had sufficient influence or control over the events leading up to the decertification, the imposition of withdrawal liability passes constitutional muster. As such, the imposition of withdrawal liability on Midwest is not arbitrary or irrational.

4. Midwest's Status As A Pre-ERISA And Pre-MPPAA Employer Does Not Negate The Constitutionality Of Its Withdrawal Liability

Midwest claims that its withdrawal liability is unconstitutional because "Midwest joined Central States before it could possibly have anticipated withdrawal liability." (Def. Mem. in Support of SJ, p. 22). Midwest relies on Justice O'Connor's *Concrete Pipe* concurrence in which she wrote:

> the Court's opinion should not be read to imply that employers may be subjected to retroactive withdrawal liability simply because 'pension plans have long been subject to federal regulation. Surely the employer that joined a multiemployer plan before ERISA had been promulgated—before Congress had made employers liable for unfunded benefits—*might* have a strong constitutional challenge to retroactive withdrawal liability.

Id. at 649 (O'Connor, J., concurring) (emphasis added). Relying on this rationale, Midwest asserts that ERISA "radically changed the legal relationship among Central States and its contributing employers such as Midwest." (Def. Mem. in Support of SJ, p. 23). Because it allegedly had no control over the statutory rules that changed its obligations to Central States. Midwest argues that it "had no meaningful opportunity in 1974 to avoid the obliga-

tions of ERISA and, short of economic suicide, no opportunity to avoid the additional obligations imposed by the MPPAA in 1980." (*Id.*). As discussed below, the case law undermines Midwest's contentions.

It is well settled that "whether or to what extent a particular piece of legislation dashes a parties' economic 'expectations' generally poses no constitutional impediment since all economic legislation—whether labeled prospective or retroactive—inherently disrupts someone's financial expectations." *Templeton Coal Co., Inc. v. Shalala*, 882 F. Supp. 799, 814 (S.D. Ind. 1995), *Davon, Inc. v. Shalala*, 75 F.3d 1114, 1123 (7th Cir.), *cert. denied, Templeton Coal Co., Inc. v. Shalala*, 117 S. Ct. 50 (1996). Midwest joined Central States in 1958, 16 years before Congress enacted ERISA and 2 years before the MPPAA. Although Midwest may not have anticipated the prospect of withdrawal liability in 1958, "pension plans . . . were the objects of legislative concern long before the passage of ERISA in 1974." *Connolly*, 475 U.S. at 226-227. *Accord R.A. Gray & Co.*, 467 U.S. at 732. Indeed, multiemployer plans have been subject to federal control since 1947. *Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. J.N. Ceazan*, 559 F. Supp. 1210, 1214 (N.D. Cal. 1983).

Moreover, Midwest voluntarily chose to continue participating in Central States after ERISA altered the pension plan landscape. In 1974, ERISA required a withdrawing employer to pay a contingent liability up to 30% of its net worth. *Concrete Pipe*, 508 U.S. at 646; *see* 29 U.S.C. §§ 1362(b), 1364 (1976 ed.). Moreover, "in 1974 . . . it was clear that if the PBGC exercised its discretion to pay benefits upon termination of a multiemployer pension plan, employers who had contributed to the plan during the preceding five years were liable for their proportionate share of the plan's contributions dur-

ing that period." *Connolly*, 475 U.S. at 227. Because Midwest remained in Central States after ERISA was enacted, Midwest could have "no reasonable expectation that the legislative ceiling would never be lifted" or "that it would not be faced with liability for promised benefits." *See Concrete Pipe*, 508 U.S. at 646; *Connolly*, 475 U.S. at 227. Furthermore, Midwest presents no evidence to show which portion of its total withdrawal liability, if any, is attributable to its pre-ERISA participation in Central States. (Arb. Op., pp. 14-15).

Additionally, once Congress learned that ERISA failed sufficiently to guarantee that employees would receive the pension benefits promised to them by employers, Congress enacted the MPPAA. At that time "[p]rudent employers . . . had more than sufficient notice not only that pension plans were currently regulated, but also that withdrawal itself might trigger additional financial obligations.' *Connolly*, 475 U.S. at 227. Thus, Midwest chose to do business in a regulated field and " 'cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.' " *Connolly*, 475 U.S. at 227 (citation omitted).

Although Midwest exercised no control over Congress, it exercised complete control over its decision to continue participating in Central States and the collective bargaining agreements which required contributions to a multiemployer plan. Significantly, Arbitrator Pritzker acknowledged that even though it may have been "economic[] suicid[e]," Midwest could have withdrawn from bargaining and from the plan. (Arb. Op., pp. 17-18). Notwithstanding ERISA and the MPPAA, Midwest determined that remaining a party to the collective bargaining agreements and, thus, a contributor to Central States, best served Midwest's interests. (Arb. Op., p. 17). Addi-

tionally, "several times after the passage of ERISA and [the] MPPAA [Midwest] ratified all decisions of the joint union-management trustees." (Arb. Op., p. 13). Thus, like a Faustian pact, Midwest voluntarily chose to accept the additional economic burdens imposed by ERISA, and later the MPPAA. Therefore, Midwest cannot now complain that it is not accountable for its choices.

Midwest also argues that the "sum total of Midwest's responsibility to Central States was to pay the collectively bargained rate for covered employees on time and in full," and that "at no time did Midwest ever agree to ensure that the benefits of Central States would be fully funded." (Def. Mem. in Support of SJ, p. 6). This argument presumes that the Due Process Clause prohibits Congress from imposing obligations beyond those voluntarily assumed by contract. Midwest's assumption is erroneous. *See Davon, Inc.*, 75 F.3d at 1125.

"In rejecting a due process challenge to the retroactive withdrawal liability provision of the MPPAA, the Supreme Court in *R.A. Gray & Co.*, stated that 'legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations' and that 'this is true even though the effect of the legislation is to impose a new duty or liability based on past acts.' " *Id.* Accordingly, Midwest's contractual obligations under the Trust Agreements and collective bargaining agreements "in no way define the outer limit of Congresses' power to legislate consistently with the Due Process Clause." *Id.*

Congress' decision to require employers, like Midwest, to fund the pension benefits they offered to their employees is neither irrational nor inequitable. Midwest obtained economic benefits from participating in Central States. The pension benefits undoubtedly attracted experienced

employees who chose to work for Midwest rather than for another employer not participating in Central States. Moreover, experienced Midwest employees may have chosen to remain working for Midwest based on the offered pension benefits. Therefore, compelling Midwest to bear responsibility for meeting its employees' legitimate expectations to receive a pension at retirement is constitutional. "At the time of its withdrawal, [Midwest] had fully received its benefits from offering the pension, but its employees had not received full payment for their services." *Thompson Bldg. Materials, Inc.*, 749 F.2d at 1402. Midwest's employees rely and depend upon the existence of a solvent pension plan at their retirement. Thus, extending Midwest's responsibility beyond its contractual promises to ensure that the goals of ERISA and the MPPAA are satisfied is rational and not arbitrary. Accordingly, the imposition of withdrawal liability for the time period before passage of the ERISA and the MPPAA is not so harsh or oppressive as to violate Midwest's Fifth Amendment rights.

5. Midwest Exerted Sufficient Control Over The Factors Affecting Its Withdrawal Liability

Midwest claims that "there has been a retroactive imposition of liability on [it] for the asserted benefit of employees without any connection between Midwest's conduct and any harm to the employees and beneficiaries of the Plan." (Def. Mem. in Support of S.J., p. 22). Again Midwest relies on Justice O'Connor's *Connolly* concurrence in which she wrote: "[o]ur recent cases leave open the possibility that the imposition of retroactive liability on employers for the benefit of employees may be arbitrary and irrational in the absence of any connection between the employer's conduct and some detriment to the em-

ployee." *Connolly*, 475 U.S. at 228-229 (O'Connor, J., concurring). Central States argues that Midwest sufficiently exercised control over the factors affecting its withdrawal liability to remove Midwest from the concerns expressed by Justice O'Connor. We agree with Central States.

Arbitrator Pritzker found that "through its authorized Employer Association bargaining agent, Midwest had *some level of control* over the level of contributions." (Arb. Op., p. 17) (emphasis added). He also held that, "[t]hrough the employer trustees, Midwest had *some level of control* over the benefits and other factors that impacted on unfunded benefit liabilities and therefore Midwest's withdrawal liability in that the Employer Trustees as prudent men and women did not have to agree to any benefit improvement or other factors which would have increased Employer Withdrawal Liability." (*Id.*) (emphasis added).

Midwest properly points out that it had no control over the decisions rendered by the Central States Trustees because they must act for the exclusive benefit of the employee beneficiaries rather than as agents of the employers or the union. *NLRB v. Amax Coal Co.*, 453 U.S. 322, 331-332 (1981). Nonetheless, Midwest repeatedly signed Trust Agreements in which Midwest agreed to be bound by the decisions of the Trustees. (Arb. Op., pp. 3, 17). Rather than disputing this fact, Midwest merely offers the unsupported conclusion that the agreements were "models of contracts of adhesion" (Def. Mem. in Opp. to Pls. Motion for SJ, p. 10).

Additionally, Midwest presented no actuarial evidence to the arbitrator challenging the benefits decisions or any other decisions rendered by the Trustees. The arbitrator's

factual conclusions are entitled to deference. We find that Midwest has not presented evidence that the arbitrator's factual conclusions were clearly erroneous. *See* 29 U.S.C. § 1401(c). Therefore, we concur with the Arbitrator Pritzker's finding that the Trustees' actions did not "unduly" add to Midwest's withdrawal liability. (Arb. Op., pp. 17-18). Accordingly, we find, as a matter of law, that Midwest failed to meet its burden to show which portion of the withdrawal liability, if any, resulted from the Trustees' decisions.

Moreover, Midwest exercised sufficient control over the level of contributions, the collective bargaining process, and other factors affecting Central States' unfunded vested benefit liabilities to satisfy the lenient rational basis test. Midwest voluntarily chose to appoint an employer association to handle its collective bargaining and knew that the contracts negotiated on its behalf were binding. Significantly, Midwest admits that the collective bargaining agreements as negotiated by the union and employer associations, set the levels of contributions paid by employers. (Def. Reply in Support of SJ, p. 19). Additionally, if Midwest was displeased with the terms of the collective bargaining agreements negotiated by its employer association, Midwest could have withdrawn from the association, as it did in late 1990, and negotiate on its own behalf. Thus, as a matter of law, we find that Midwest exercised little, but sufficient meaningful control over the conntribution levels it was required to pay, a factor affecting Central States' unfunded vested benefits.

Midwest further relies on Arbitraor Pritzker's determination that Central States is a "hybrid" Taft-Hartley plan in the manner used by Justice O'Connor in her *Connolly* concurrence. (Arb. Op., p. 16). According to Justice O'Connor:

> Taft-Hartley plans are the product of joint negotiation between employers and a union and are administered by trustees nominated in equal numbers by employers and the union . . . most Taft-Hartley plans 'possess the characteristics of both fixed contributions and fixed benefits'. . . . Under these hybrid Taft-Hartley plans it is the plans' trustees not the employers and the union, who are 'usually responsible for determining the types of benefits to be provided . . . and the level of benefits, although in some cases these are set in the collective bargaining agreement.'

Connolly, 475 U.S. at 1030 (O'Connor, J., concurring) (citations omitted). Based on her analysis of hybrid plans, Justice O'Connor opined that:

> . . . whatever promises a collectively bargained plan makes with respect to benefits may not always be rationally traceable to the employer's conduct and that it may sometimes be quite fictitious to speak of some plans as 'promising' benefits at a specified level, since to do so ignores express and bargained for conditions on those promises. Where the plan's fixed contribution aspects were agreed to by employees through their exclusive bargaining representatives, and *where employers had no control over the level of benefits promised,* employer responsibility for the benefits specified by the plan is very much attenuated, and employee expectations that these benefits will in all events be paid, in the face of plain language to the contrary, are not easily traceable to the employer's conduct.

Connolly, 475 U.S. at 235 (O'Connor, J., concurring) (emphasis added).

Although Midwest is a hybrid Taft-Hartley plan as contemplated by Justice O'Connor, Midwest's circumstances fall outside Justice O'Connor's constitutional concerns. Justice O'Connor was concerned with employers who had "no control over the level of benefits promised." Id. Because Midwest exercised some control over the factors affecting its withdrawal liability, application of the MPPAA is rational and not arbitrary.

Again relying on Justice O'Connor's *Connolly* concurrence, Midwest contends that its withdrawal caused no harm to active or retired participants because the assets held by Central States have grown while its unfunded vested benefits level has decreased from 1980 to 1991. In 1991, the assets of Central States totaled $11.801 billion and its unfunded vested benefits totaled $1.764 billion.

Although Central States successfully decreased is unfunded vested benefits level by the time Midwest withdrew, a significant amount, $1.764 billion, remains. The MPPAA assures that each withdrawing employer pays its proportionate share of the unfunded vested benefits at the time of its withdrawal so that present and future retirees will receive their promised pension benefits. The statute, however, does not exempt an employer from paying its fair share of the unfunded vested benefits because the pension plan is enjoying a period of financial strength. To do so would be contrary to the express purpose of the MPPAA. *See* 29 U.S.C. §§ 1001, 1001(a), 1381.

Midwest also states there is no record evidence demonstrating that any retirees have not received their pension benefits. Even though Midwest's withdrawal caused no immediate harm to current retirees, the imposition of withdrawal liability ensures that the withdrawal does not harm future retirees or future beiefits. By paying its withdrawal

liability Midwest helps to guarantee, as the MPPAA intended, that Central States' assets are sufficient to meet the present value of the benefits that Central States must pay to Midwest's employees in the future. Moreover, Midwest offers no evidence to establish that its past contributions plus its allocable share of Central States' earnings exceed the present value of all benefits accrued by Midwest's employees, i.e., Midwest's withdrawal liability. *See Connolly*, 475 U.S. at 1032 (O'Connor, J., concurring). Accordingly, we find that Justice O'Connor's concerns are not applicable to Midwest.

In sum, Midwest has failed to demonstrate that the MPPAA, as applied, is arbitrary or irrational. Other than Justice 'Connor's concurring opinions in *Connolly* and *Concrete Pipe*, there is no authority supporting Midwest arguments. Thus, we find that the imposition of withdrawal liability does not violate Midwest's Fifth Amendment right to substantive due process.

III. *CONCLUSION*

For the foregoing reasons, we find that the imposition of withdrawal liability under the MPPAA as applied to Midwest violates no substantive constraint of the Fifth Amendment. Because Midwest raised no actuarial challenge to the amount of liability imposed by Central States, Midwest must pay the entire outstanding withdrawal liability, plus any accrued interest, less any interim payments made pursuant to the parties' September 24, 1996 stipulation.

Central States' motion for summary judgment is granted. Midwest's motion for summary judgment is denied.

Central States is hereby ordered to submit an affidavit and schedule of the amount due as of the date of this

ruling by April 17, 1998 so that a judgment may be entered. Any response by Midwest must be filed by April 24, 1998.

All other pending motions are denied as moot.

It is so ordered.

/s/ Wayne R. Andersen
WAYNE R. ANDERSEN
United States District Judge

Dated: March 30, 1998

APPENDIX C

AMERICAN ARBITRATION ASSOCIATION

Case No. 51 621 00577 94

IN THE MATTER OF ARBITRATION

between

MIDWEST MOTOR EXPRESS, INC.,

and

CENTRAL STATES SOUTHEAST AND SOUTHWEST AREAS PENSION FUND.

OPINION AND AWARD

PROCEDURE:

Midwest Motor Express, Inc. (the "Company" or "Midwest") was represented by Hervey H. Aitken, Esq. and Roy A. Sheetz, Esq. of Taylor, Thiemann & Aitken.

Central States Southeast and Southwest Areas Pension Fund (the "Fund" or "Central States") was represented by James P. Condon, Esq., Terence G. Craig, Esq. and Ms. Helen N. Burke, Esq.

Prior to the hearing, which was held on January 14, 1997, the parties the Arbitrator and the Administrator exchanged several letters and had several telephone conference calls to discuss various procedural matters. There were a total of 79 exhibits submitted at the hearing by the Fund. The Company submitted 11 exhibits. I received

the initial briefs of the parties on April 8, 1997, and the reply briefs of the parties on May 9, 1997.

ISSUES:

The parties stipulated at the hearing that the following issues were before me:

1. whether Midwest is a pre-ERISA employer;
2. whether Midwest's withdrawal from Central States was involuntary;
3. whether Central States is a hybrid Taft-Hartley pension plan;
4. whether Midwest has had any control over the level of Central States' benefits, contributions, or other factors that produce unfunded vested benefit liabilities for Central States for the period 1973 to the time of Midwest's withdrawal from Central States;
5. whether Central States Pension Fund is a defined benefit pension plan and is therefore covered by and subject to Title IV of ERISA;

5A. whether Central States is a defined contribution plan (individual account plan) within the meaning of ERISA;

5B. whether Central States is a hybrid plan within the meaning of ERISA; and

6. whether benefit increases by Central States have unduly added to Midwest's withdrawal liability.

FACTS:

Midwest was a member of a multi-employer bargaining association called Regional Carriers, Inc., who bargained

with the Teamsters Union on behalf of member companies leading to a series of contracts between the Union and the Association from 1958 to the contract expiring on March 31, 1991.

While a member of the Association, Midwest made contributions to the Fund. The Fund was established in 1955 as a Taft-Hartley Fund under the terms of Section 301 of the Labor Management Relations Act ("the Taft-Hartley Act") and has an equal number of union and management trustees. Midwest did not appoint its own management trustee as one of the management trustees, but was represented by management trustees appointed by Employer Associations. All contributions made by all contributing employers go to the Fund and are used for administrative and benefit purposes. No employee has an individual separate account. The amount of pension benefits employees receive is dependent on the amount of negotiated employer contributions. Midwest started to contribute to the Fund in 1958 and signed a series of participation agreements agreeing to be bound by the decisions of the Joint Trustees. During Midwest's participation in the Fund following the passage of the Multi-Employer Pension Plan Amendments Act of 1980 ("MPPAA") from 1980 to 1991, the unfunded vested benefits of the Fund were reduced from 3.744 billion (52% of vested benefit liabilities) to 1.76 billion (13.6% of vested benefit liabilities). The June 1996 actuarial valuation shows an unfunded vested benefit liability of 2.051 million. The Fund's amortization period as of June 1996 was 28.7 years and in the 1995 report it was 28.0 years. In 1980, Central States vested benefits were valued at 7.206 billion. By 1991, vested benefit liabilities amounted to 12.979 billion. The assets of the Fund grew from $2.970 billion in 1980 to $11,801 billion in 1991. During the years of Midwest's participation, the Trustees of the

Fund agreed on several occasions to increase the benefits paid to Fund participants. During the years of Midwest's participation in the Fund, the level of employers' contributions to the Fund increased several times as the result of settlements of the terms of successor collective bargaining agreements.

On July 19, 1990, Midwest asked the Fund for an estimate of its Employer Withdrawal Liability. The Fund advised the Company that its Employer Withdrawal Liability was three million twenty-three thousand dollars.

On November 21, 1990, the Company notified the Union that it was withdrawing from the Association and for the first time wanted to negotiate a separate contract with the Union.

On December 10, 1990, the Company again requested that the Fund estimate its Employer Withdrawal Liability. The Fund estimated that Midwest's liability had not changed since the Fund's July estimate.

Midwest and the Teamsters Union commenced negotiations for a contract solely between Midwest and the Union early in 1991.

Midwest and the Union could not agree on the terms of a successor contract during the 1991 negotiation between Midwest and the Union, and on August 12, 1991, the employees of Midwest went out on strike. The Company's final offer prior to the strike would have stopped the Company's contributions to the Fund and would have substituted a 401k plan with Employer and Union splitting the contributions. In addition, Midwest was proposing other cost concessions.

In October of 1991, Midwest started to hire permanent replacements for the strikers.

On December 10, 1991, the Fund demanded the payment of two million five hundred forty-six thousand dollars in Employer Withdrawal Liability.

Midwest during this period of time was selling or attempting to sell various of its divisions.

On March 5, 1992, Midwest wrote to the Fund's Administrator and denied that it had withdrawn from the Fund.

In May 1992, the parties agreed to a package of wage concessions which would have kept Midwest in the Fund, but could not agree on the retention by the Company of replacement workers hired after the commencement of the strike. Midwest took the position that it would not displace the permanent replacements for the strikers. The Union took the position that there could be no collective bargaining agreement unless the Company agreed to do so. The Union filed unfair labor practice charges against the Company. The Company was not found by the NLRB to have engaged in surface or otherwise illegal bargaining.

On March 5, 1992, Midwest appealed to the Trustees and asked the Trustees to reconsider their initial determination of Employer Withdrawal Liability. Midwest supplemented this appeal on April 9, 1992. In May 1992, the Fund rescinded its Employer Withdrawal Liability assessment against Midwest following the motion by Midwest for a court injunction.

In January 1991, a decertification petition was filed. The votes by the majority of the eligible voters were challenged. The Union filed objections to the decertification election, but subsequently withdrew its objection and on April 15, 1994, the NLRB certified the results of the decertification election as 56 to 17 to decertify the Union

and the Union thereafter was no longer the bargaining representative of the employees of Midwest.

On April 26, 1994, the Fund demanded $2,546,439.30 in Employer Withdrawal Liability from Midwest. The pre-1980 pool liability of the Employer Withdrawal Liability was $1,814,856 and the post-1979 pool liability was $731,582. On July 23, 1994, Midwest requested that the Trustees review the determination. On August 22, 1994, the Trustees reaffirmed the assessment and the payment schedule. Midwest requested arbitration under the rules of the American Arbitration Association on October 4, 1994. Both parties initiated litigation. The Fund filed a lawsuit in the District Court of Northern District of Illinois in April 1996 to compel interim payments to the Fund. Midwest filed a lawsuit in the District Court for North Dakota in May 1994 seeking a ruling that MPPAA was unconstitutional as applied to Midwest and seeking an injunction against the Fund's effort to collect interim payments of Employer Withdrawal Liability from Midwest. The North Dakota case was transferred to the Northern District of Illinois. Midwest appealed to the Eighth Circuit Court of Appeals. When its appeal was denied, Midwest petitioned the United States Supreme Court for certiorari. The issues before the various courts includes which court has venue to decide whether Midwest must pay its scheduled payments of Employer Withdrawal Liability pending receipt of the Arbitrator's decision and, ultimately, whether any Employer Withdrawal Liability may be collected from Midwest based on the facts of this case.

THE MULTI-EMPLOYER PENSION PLAN AMENDMENT ACT OF 1980

RESOLUTION OF DISPUTES

Sec. 4221.(a)(1) Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 4201 through 4219 shall be resolved through arbitration. Either party may initiate the arbitration proceeding within a 60-day period after the earlier of—

(A) the date of notification of the employer under section 4219(b)(2)(B), or

(B) 120 days after the date of the employer's request under section 4219(b)(2)(A).

The parties may jointly initiate arbitration within the 180-day period after the date of the plan sponsor's demand under section 4219(b)(1).

(2) An arbitration proceeding under this section shall be conducted in accordance with fair and equitable procedures to be promulgated by the corporation. The plan sponsor may purchase insurance to cover potential liability of the arbitrator. If the parties have not provided for the costs of the arbitration, including arbitrator's fees, by agreement, the arbitrator shall assess such fees. The arbitrator may also award reasonable attorney's fees.

(3)(A) For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 4201 through 4219 and section 4225 is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

(B) in the case of the determination of a plan's unfunded vested benefits for a plan year, the determination is presumed correct unless a party contesting the determination shows by a preponderance of evidence that—

(i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or

(ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods.

(b)(1) If an arbitration proceeding has been initiated pursuant to subsection (a), the amounts demanded by the plan sponsor under section 4219 (b)(1) shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.

(2) Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the issuance of an arbitrator's award, in an appropriate United States district court in accordance with section 4301 to enforce, vacate, or modify the arbitrator's award.

(3) Any arbitration proceedings under this section shall, to the extent consistent with this title, be conducted in the same manner, subject to the same limitations carried out with the same powers (including subpoena power), and enforced in United States courts as an arbitration proceeding carried out under title 9, United States Code.

(c) In any proceeding under subsection (b), there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct.

(d) Payments shall be made by an employer in accordance with the determinations made under this part until the arbitrator issues a final decision with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination. If the employer fails to make timely payment in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of section 515).

(e) If any employer requests in writing that the plan sponsor make available to the employer general information necessary for the employer to compute its withdrawal liability with respect to the plan (other than information which is unique to that employer), the plan sponsor shall furnish the information to the employer without charge. If any employer requests in writing that the plan sponsor make an estimate of such employer's potential withdrawal liability with respect to the plan or to provide information unique to that employer, the plan sponsor may require the employer to pay the reasonable cost of making such estimate or provide such information.

POSITIONS OF THE PARTIES:

The Fund

1. In addition to the six issues agreed to by the parties at the hearing, the Arbitrator should decide whether

MPPAA is constitutional as applied to the facts of this case;

2. Midwest is not just a pre-ERISA employer but a post-ERISA employer as well;

3. Midwest's withdrawal resulted from numerous voluntary uncoerced decisions that Midwest itself made, and thus was not truly involuntary. Midwest chose to leave the multi-employer bargaining unit and initiated hard bargaining which it knew would result in a strike when it proposed to stop paying into the Fund, hired permanent replacements, refused to release the replacements when a concessionary settlement could have been achieved, and initiated the decertification. The Fund cites the Company's September 21, 1993 memorandum concerning decertification as showing the Company's intent to orchestrate the decertification;

4. Central States is not a "hybrid" plan under any meaning and definition of hybrid in that employer contributions are used for the benefit of all Fund's participants and there are no separate accounts established for individual participants in the Central States Fund. The Fund asserts that it is the same type of fund that was involved in the Supreme Court has in two earlier holding that MPPAA was constitutional;

5. Midwest had a substantial degree of control over contributions to Central States through its Employer Association bargaining agent which it voluntarily selected (and hence over any resulting unfunded vested benefits). The Union contracts signed by Midwest from 1958 and 1988 specifically authorized and ratified ". . . all actions already taking or to be taken by such Trustees within the scope of their authority . . .". The Fund asserts that the time for Midwest to challenge constitutionality of MPPAA

was in 1982 which was its first post-MPPAA contract. Having not done so and repeatedly thereafter ratifying the decisions by the Trustees; and

6. Employees properly expected the Company to be responsible for pension benefits.

The Company

1. The issues in this case will establish the factual predicate for an as-applied constitutional challenge to the collection of withdrawal liability from the Company. The Company relies on the concurring opinions of Justice O'Connor in *Connolly v. PBGC*, 475 U.S. 211 (1986) and *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993);

2. Midwest is a "pre-ERISA" employer in that it started to contribute to the Fund prior to the passage of MPPAA in 1980;

3. Midwest's withdrawal from the Fund was involuntary. The Company did not campaign during the decertification process and indeed tried to avoid decertification and only sought reduced costs during negotiations;

4. The Fund was a hybrid Taft-Hartley pension plan from 1973 to 1991 as Justice O'Connor used that phrase in her cited concurring opinions;

5. Midwest never had control over the level of Fund benefits, the amount of employer contributions or other factors that produce unfunded vested liabilities for the Fund;

6. Benefit increases for employees decided by the Fund's Trustees unduly added to Midwest's withdrawal liability; and

7. The parties stipulated as to the issues before the Arbitrator with the Company proposing four issues and the Fund proposing five questions with some overlap. None of the issues concern the constitutionality of MPPAA. This issue is therefore not before the Arbitrator.

OPINION:

This is a very unusual case. The issues presented to me concern not the actuarial soundness of decisions made by the Trustees as applied to a withdrawing employer but rather setting the stage for an appeal by Midwest to the United States Supreme Court that MPPAA is unconstitutional, at least as it applies to the facts in this case. Midwest will be citing the decisions by Justice O'Connor in *Connolly, supra,* and *Concrete Pipe, supra.*

In *Connolly,* Justice O'Connor wrote:

> "In my view, imposition of this type of retroactive liability on employers, to be constitutional, must rest on some basis in the employer's conduct that would make it rational to treat the employees' expectations of benefits as the employer's responsibility.
>
> * * * *
>
> Where a pension plan is established through collective bargaining between one or more employers and a union, matters may be different. Such plans, commonly known as 'Taft-Hartley' plans, were authorized by § 302(c)(5) of the Labor Management Relations Act, 1947 (LMRA), 61 Stat. 157, codified, as amended, at 29 U.S.C. § 186(c)(5).
>
> * * *
>
> The foregoing observations suggest to me that whatever promises a collectively bargained plan makes with respect to benefits may not always be rationally trace-

> able to the employer's conduct and that it may sometimes be quite fictitious to speak of such plans as 'promising' benefits at a specified level, since to do so ignores express and bargained-for conditions on those promises. Where the plan's fixed-contribution aspects were agreed to by employees through their exclusive bargaining representatives, and where employers had no control over the level of benefits promised, employer responsibility for the benefits specified by the plan is very much attenuated, and employee expectations that those benefits will in all events be paid, in the face of plain language to the contrary, are not easily traceable to the employer's conduct."

In *Concrete Pipe, supra,* Justice O'Connor, concurring in the opinion of the Court, wrote:

> "Surely the employer that joined a multiemployer plan before ERISA had been promulgated—before Congress had made employers liable for unfunded benefits—might have a strong constitutional challenge to retroactive withdrawal liability. The issue is not presented here—again, petitioner joined the Construction Laborers Pension Trust *after* the passage of ERISA—and the Court does not address it. It remains to be resolved in a future case."

While the Court upheld the constitutionality of the MPPAA in both decisions, it is Midwest's essential contention that the particular circumstances of the case before me falls within Justice O'Connor's concerns as articulated in her opinions in these two decisions and therefore MPPAA should not be applied to Midwest because, at least in these circumstances, MPPAA is unconstitutional. The Fund, of course, disagrees with Midwest's contentions and argues that Midwest should and must pay the

amount of Employer Withdrawal Liability assessed by the Fund in accordance with the provisions of MPPAA.

All of the issues stipulated to by both parties concern Midwest's attempt following their receipt of this arbitration decision to use the arbitration decision to get the United States Supreme Court to grant certiorari and ultimately to rule that MPPAA may not be applied to Midwest.

I will not attempt to review the unconstitutionality of MPPAA as it applies to Midwest or like situated employers for two reasons: (1) The parties stipulated on the Record as to the issues before me and the constitutionality of MPPAA was not one of the issues; (2) no arbitrator has the expertise to render decisions as to the constitutionality of any law. Only federal courts and ultimately the United States Supreme Court can decide whether or not a law is constitutional.

I also cannot decide how Justice O'Connor and other justices will view the facts of this case as they apply to the ultimate issue of the constitutionality of MPPAA. I can only decide the issues presented to me by stipulation of the parties. The actuarial soundness of the plan, the soundness of the decisions made by the Fund actuaries, administrators and trustees are also not before me. Nor is whether the actuaries, administrators and trustees complied with the provisions of MPPAA in reaching their decisions before me. The Fund attached to its brief a 1991 report of the Pension Benefit Guaranty Corporation to Congress concerning "Union-Mandated Withdrawals," two of which would be decertifications, or a union relinquishing its right to bargain in order to trigger withdrawal lliability against a hard bargaining employer. The PBGC recommended that no special rules should be written covering these circumstances. The PBGC report also concluded that when such circumstances arise, the employer

must pay its Employer Withdrawal Liability even where the employer has demonstrated willingness to continue in the plan. The PBGC report does note that an arbitrator may initially decide when a withdrawal occurs "solely because" of the union acting as provided under Section 4218(2) with respect to labor disputes and, ultimately, this decision may be reviewed by the courts. The balance of the PBGC report may be used by Congress to determine whether changes in MPPAA are necessary.

Because the issues before me do not involve any determinations by the plan's Trustees, the standard in Section 4221(b)(3)(B) of ERISA of determinations made by Trustees presumed to be correct unless the party contesting the determination shows by a preponderance of evidence that the determination was unreasonable or clearly erroneous, does not apply. With the above caveats in mind, I turn to the specific issues which the parties stipulated I must decide:

1. *Whether Midwest Is A Pre-ERISA Employer?*

Midwest started to participate in the Central States Plan in 1958. The Employee Retirement Income Security Act ("ERISA") was passed in 1974. Therefore, Midwest is a pre-ERISA employer because it joined the plan prior to the passage of ERISA. It is also true that Midwest continued in the plan after the passage of ERISA in 1974 and after the passage of MPPAA in 1980, and several times after the passage of ERISA and MPPAA ratified all decisions of the joint union-management trustees. The question presented by Justice O'Connor's concurring decision in *Concrete Pipe, supra,* is whether it is constitutional to base any part of an assessment of Employer Withdrawal Liability on events which occurred in the Fund prior to the passage of ERISA. In the case before me, it is clear that the pre-1980 "pool" portion of Employer

Withdrawal Liability was $1,814,856 and the post-1980 pool was $731,582, but there was no computation of the amount of Employer Withdrawal Liability for the pre-1980 pool period which was attributable to the period from 1958 to the passage of ERISA. If, as Midwest will presumably argue to the Supreme Court, if it has the opportunity to do so, that at a minimum, the amounts of Employer Withdrawal Liability attributable to actuarial experience which occurred prior to the passage of ERISA must be subtracted from the amount of Employer Withdrawal Liability, this computation will be meaningful.

2. *Whether Midwest's Withdrawal From Central States Was Involuntary?*

The legal issues concerning whether Midwest bargained in bad faith or illegally instigated the decertification of the Union as the collective bargaining agent is within the exclusive jurisdiction of the National Labor Relations Board. The Board did not find that the Employer broke the law by its hard bargaining or when employees decertified the Union. I cannot substitute my judgment for the judgment of the Board. Decertification triggers an assessment of Employer Withdrawal Liability because the Employer ceases to have an obligation to contribute under the plan. Based on the lack of adverse rulings against the Company by the National Labor Relations Board, and the fact that a legal decertification, i.e., one that is not illegally promulgated by the Employer, is a voluntary act by the employees, not the Employer. I cannot conclude that Midwest's withdrawal was voluntary. Midwest may have been extremely pleased to have the employees vote to decertify, but inasmuch as it was a voluntary act by the employees, I conclude that Midwest's withdrawal from the plan was involuntary.

I must leave to the Court the issue not before me whether the Employer's conduct in the case before me falls within the employer's conduct described by Justice O'Connor in *Connolly, supra,* when she wrote: ". . . The imposition of retroactive liability on employers for the benefit of employees may be arbitrary and irrational in the absence of any connection between the employer's conduct and some detriment to the employee."

3. *Whether Central States Is A Hybrid Taft-Hartley Pension Plan?*;

5. *Whether Central States Pension Fund Is A Defined Benefit Pension Plan And Is Therefore Covered By And Subject To Title IV Of ERISA?*;

5A. *Whether Central States Is A Defined Contribution Plan (Individual Account Plan) Within The Meaning Of ERISA?*; and

5B. *Whether Central States Is A Hybrid Plan Within The Meaning Of ERISA?*

These issues overlap and can be addressed as one issue.

Midwest in its responsive brief agreed that for purpose of ERISA, Central States is a defined benefit plan, is a Taft-Hartley plan, is not a defined contribution plan or an individual account plan, and is not a hybrid plan in an actuarial sense. Midwest argues, however, that Central States is a hybrid plan only as Justice O'Connor used that term in *Connolly, supra,* in that it is characterized by the collective bargaining of contribution rates and the setting of benefits by a Board of Trustees, independent of the collective bargaining process.

On the basis of Midwest's position, I conclude that the answer to issue 3 is no; to issue 5 is yes; to issue 5A is no; to issue 5B is no.

In view of the above stipulations by Midwest and my conclusions, I will address only Midwest's position and the Fund's countervailing position on the word "hybrid" as used by Justice O'Connor in *Connolly, supra.*

In her concurring opinion in *Connolly* in which Justice Powell joined, Justice O'Connor wrote in describing Taft-Hartley plans that "most Taft-Hartley plans 'possess the characteristics of both fixed contributions and fixed benefits' (quoting a 1963 study by J. Melone and then PBGC) 'employers participating in multiemployer plans are generally required to contribute a fixed rate specified in the collective bargaining agreement. . . . Traditionally, the multiemployer plan or the bargaining agreement have limited the employers contractual obligations to contribute at the fixed rate, whether or not the contributions were sufficient to provide the benefit established by the Joint Board or the collectively bargaining agreement.' Justice O'Connor goes onto write "under these hybrid Taft-Hartley plans it is the plans' Trustees, not the employers and the union, who are 'usually responsible for determining the types of benefits to be provided . . . and the level of benefits, although in some cases these are set in the collective bargaining agreement' quoting the report by the PBGC. Justice O'Connor goes onto to cite *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981), in which the court held that a Fund Trustee must act for the exclusive benefit of the employee beneficiaries of the Trust rather than as agents of either the employer or the union.

As I understand Justice O'Connor's use of the word "hybrid" in *Connolly, supra,* she concludes that the union and the company negotiate the amount of contributions to Taft-Hartley plans in their collective bargaining negotiations and the trustees decide, based on actuarial advice, the degree of benefits that can or should be provided to

the beneficiaries of the plan. Therefore, she concludes that Taft-Hartley plans are hybrid in this sense. I concur that in the sense Justice O'Connor uses the term "hybrid" in *Connolly, supra,* and in that sense only, Central States is a hybrid plan.

4. *Whether Midwest Has Had Any Control Over The Level Of Central States' Benefits, Contributions, Or Other Factors That Produce Unfunded Vested Benefit Liabilities For Central States For The Period 1973 To The Time Of Midwest's Withdrawal From Central States?*; and

6. *Whether Benefit Increases By Central States Have Unduly Added To Midwest's Withdrawal Liability?*

During much of the time Midwest participated in the plan under the conditions bargained on its behalf and on behalf of other employers represented by its authorized Employer Association bargaining unit, the Teamsters was a powerful union and the employers were regulated by the federal government and could therefore pass on all labor cost increases incurred as a result of successor collective bargaining agreements to customers. While the Teamsters Union is still powerful, but with many fewer members, the era of government regulation of trucking is over. Unionized employers have as a result been thrown into the competitive wars based on their costs and efficiency as compared with non-union trucking employers as well as other forms of product delivery.

When ERISA was passed in 1974, Midwest could have, as it did in 1991, withdraw from the Employer Association and bargain its own individual contract and attempt to bargain itself out of the Central States plan. However, during an era of the powerful Teamsters and governmental regulation, Midwest determined that it was not in

its benefit to do so and voluntarily continued to be bound to contracts negotiated by its Employer Association bargaining agent and continued to ratify the decisions of the Trustees of the Central States Fund. Through its authorized Employer Association bargaining agent, Midwest had some level of control over the level of contributions. Through the employer trustees, Midwest had some level of control over the benefits and other factors that impacted on unfunded vested benefit liabilities and therefore Midwest's withdrawal liability in that the Employer Trustees as prudent men or women did not have to agree to any benefit improvement or other factors which would have increased Employer Withdrawal Liability.

While as a practical real life matter, both the employers' multi-employer bargaining association and the Employer Trustees may have done a poor job from Midwest's point of view, perhaps because of the combination of union power and the ability to pass on increased costs to the customers as a result of governmental regulation and the degree to which truckers were in that era unionized, Midwest cannot be exempt from any responsibility for these decisions in that it could have withdrawn from bargaining and from the Fund. It may have been economically suicidal to do so in that era given whatever Midwest's economic circumstances were all along the time continuum from 1958 to 1991, but it was possible.

I must therefore conclude that issue 4 must be answered in the affirmative.

As to question 6, it may be that the Trustees acted very unwisely in increasing benefits at least to the extent they did, because all benefit increases unless fully funded by employer contributions in a fund that had heretofore no Employer Withdrawal Liability, can increase the poten-

tial withdrawal liability of participating employers. However, in the absence of any actuarial evidence by Midwest challenging the benefit decisions or other decisions by the Fund Trustees, I cannot conclude that the Trustees "unduly" added to Midwest's withdrawal liability. I must therefore answer issue number 6 in the negative.

Malcolm L. Pritzker
MALCOLM L. PRITZKER

Dated: May 20, 1997

AWARD

1. Midwest is a pre-ERISA employer in that it started to participate in the Central States Pension Fund in 1958 well prior to the passage of ERISA in 1974. Midwest continued to participate in the Fund after the passage of ERISA until it withdrew from the Fund.

2. Midwest's withdrawal from Central States was involuntary.

3, 5, 5A, 5B. Central States is not a hybrid Taft-Hartley pension plan within the meaning of ERISA or a defined contribution plan. Central States is a defined benefit pension plan and is therefore covered by Title IV of ERISA. Central States is a hybrid plan as that phrase is used by Justice O'Connor in *Connolly, supra.*

4. Midwest had little but some control over the level of contributions, the degree of benefits or other factors that produced unfunded vested benefits for Central States from the period of 1973 to the time Midwest's withdrawal from Central States.

6. On the basis of the Record before me, it is impossible to conclude that benefit increases by Central States unduly added to Midwest's withdrawal liability.

Malcolm L. Pritzker
MALCOLM L. PRITZKER

Dated: May 20, 1997

Supreme Court, U.S.
FILED
OCT 12 1999
CLERK

No. 99-420

IN THE
Supreme Court of the United States

MIDWEST MOTOR EXPRESS, INC.,
MME, INC., MIDNITE EXPRESS, INC.,
and EXPRESS CARTAGE, INC.,
Petitioners,

v.

CENTRAL STATES SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit's holding that an alleged jurisdictional defect in a complaint (*i.e.*, lack of ripeness) may be cured by an amended pleading should be reviewed or disturbed by this Court?

2. In light of the fact that the Arbitrator and the Courts below found that (i) Midwest Motor Express, Inc. ("Midwest") had failed to show any specific amount of "retroactive" liability (in a constitutionally meaningful sense) imposed upon it by the Multiemployer Pension Plan Amendment Act ("MPPAA"), and (ii) that Midwest had at least some control over the factors that resulted in the liability it faced under MPPAA, should this Court again scrutinize the validity of MPPAA under the Fifth Amendment of the U.S. Constitution—an issue which this Court took up in both *Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211 (1986) and *Concrete Pipe v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993)?

3. Whether in this case this Court should attempt to resolve any issue concerning an alleged violation of the *ex post facto* clause of Article I, Section 9 of the U.S. Constitution, given that Midwest did not raise the *ex post facto* issue in the courts below, and Midwest could not, in any event, specify or quantify any retroactive impact of MPPAA?

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CENTRAL STATES SOUTHEAST AND
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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Midwest's Withdrawal From The Pension Fund.

Central States is a multiemployer pension plan and is subject to joint union and employer administration, as required by Section 301 of the Labor Management Relations Act of 1947. During the period in question, Central States had four employer-appointed Trustees and four union-appointed Trustees. Midwest Petition Appendix ("Midwest App."), p. 3a.

Central States collects contributions from the participating employers as provided in their collective bargaining

agreements entered with local unions or affiliates of the International Brotherhood of Teamsters. Midwest App., p. 3a. The amounts so collected are pooled and used for the benefit of all Fund participants. *Id.* Central States pays benefits to participants and their beneficiaries under the terms of the plan, based upon their years and months of credited or covered employment. Midwest App., p. 53a.

Midwest is a North Dakota corporation. Midwest App., p. 2a. The other defendants are trades or businesses under common control with Midwest and are therefore jointly and severally liable for any withdrawal liability incurred by Midwest. 29 U.S.C. § 1301(b)(1).

Midwest began contributing to Central States on behalf of its union employees pursuant to a collective bargaining agreement in 1958. Midwest App., p. 3a. Midwest continued to contribute continuously to Central States pursuant to a series of collective bargaining agreements covering successive three-year periods ending in 1991. *Id.*

Until the end of 1990, Midwest belonged to an association of trucking industry employers known as Regional Carriers, Inc. ("RCI"). Midwest App., p. 3a. This association was formed for purposes of conducting multi-employer bargaining with the union. Up until 1991, RCI had agreed on behalf of Midwest (along with other trucking industry employers) to the wage and employee benefit provisions of the various National Master Freight Agreements. Midwest App., pp. 53a-54a.

Midwest's last collective bargaining agreement with the union expired on March 31, 1991. Midwest App., p. 54a. Midwest then freely and of its own accord withdrew from RCI for the express purpose of negotiating as a single employer with the union concerning the contract for 1991-94. Midwest App., pp. 53a-54a.

In early August, 1991 Midwest presented the union with a new contract offer. Midwest App., p. 54a. *Under this offer Midwest proposed that it withdraw from Central States and substitute a company "401(k)" pension plan. Id.* Midwest also proposed wage concessions. *Id.* In response to this proposal, on August 12, 1991, Midwest's union employees went on strike, never to return. *Id.* After August 12, 1991, Midwest ceased to have any obligation to contribute to the Central States, and its contributions never resumed thereafter. Midwest App., pp. 54a-56a.

As early as October 1991 Midwest's hired permanent replacements for some of the strikers. Midwest App., 54a.

In May 1992, the union agreed to accept wage concessions proposed by Midwest. Midwest App., p. 55a. However, as part of this package of wage concessions, the union proposed that upon returning to work, the strikers displace the replacements hired by Midwest. *Id.* Midwest would not agree to this term. The negotiations stalled on this point through the remainder of 1992 and 1993. *Id.*

On April 15, 1994, the replacement workers whom Midwest had hired during the strike voted to decertify the union. Midwest App., p. 22a. At that point, the strike ended, and Midwest's cessation of pension contributions to Central States became permanent. Midwest App., pp. 55a-56a.

On April 26, 1994, Central States issued a "notice and demand" of withdrawal liability to Midwest, pursuant to the Multiemployer Pension Plan Amendment Act of 1980 ("MPPAA"), 29 U.S.C. § 1381 *et seq.* This notice of assessment was in the principal amount of $2,546,439.30 and included a demand for payment. Midwest App., p. 56a. Under MPPAA, Central States is authorized (and indeed required) to collect a pro-rata share of its "unfunded

vested benefits" ("UVBs") from employers who permanently cease their obligation to contribute to Central States, *i.e.*, "withdraw" from Central States. UVBs represent the shortfall between the present value of a pension plan's assets and the present value of the vested pension benefits it is obligated to pay.

B. Decisions Impacting Central States UVBs and Midwest's Involvement in Those Decisions.

In this case Arbitrator Malcolm Pritzer found, contrary to Midwest's contentions, that the increases in pension benefits allowed over the years under the Central States Plan "had not unduly added to [Midwest's] withdrawal liability." Midwest App., pp. 69a-70a.

As Central States' enrolled actuary testified:

> [*T*]*he employer has control over* [*the*] *contribution levels.* Those are negotiated, and the employer has to agree to the contributions that are made to the fund. *And it's the contributions that govern the benefit levels provided to the employees.*

Appendix hereto, p. 2a. In addition, Central States advises the negotiating parties (*i.e.*, labor and management) of any *benefit increases* that would result from any contribution rate increases to which they agree. Appendix hereto, p. 4a.

Under each of Midwest's successive collective bargaining agreements, the company expressly *"ratified"* all actions taken by the Central States Trustees. Midwest App., pp. 42a-43a. By definition, this blanket ratification of action taken by Central States included ratification of pension benefit increases. *Id.*

C. Procedural Background and Rulings Below.

1. Interim Payment Dispute.

On April 29, 1994, Central States sent Midwest a statutory "notice and demand" for payment of the $2,546,439.30 withdrawal liability amount. Midwest App., p. 56a. On that same day, before Midwest's first installment payment of withdrawal liability was due, Central States filed a declaratory judgment action against Midwest in the United States District Court for the Northern District of Illinois. Midwest App., p. 5a. In May 1994—also before Midwest's first withdrawal liability payment was due—Midwest filed its own declaratory judgment action against Central States in the U.S. District Court for North Dakota (where Midwest has its principle place of business). Midwest App., p. 56a.

The North Dakota court transferred the North Dakota action to the Northern District of Illinois; the Eighth Circuit affirmed this transfer decision. *Midwest Motor Express, Inc. v. Central States*, 70 F.3d 1014 (8th Cir. 1995).

In the meantime, Midwest's installment payments of withdrawal liability fell due, but Midwest failed to pay them—as Central States' declaratory judgment action had anticipated. Midwest App., pp. 7a-8a. Central States then amended its complaint to seek a money judgment for the misssed withdrawal liability payments. *Id.* The parties then proceeded to arbitrate the merits of the withdrawal liability dispute.[1]

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[1] Under MPPAA, withdrawal liability disputes are the subject of mandatory arbitration with plenary review of all legal questions by the federal courts. 29 U.S.C. § 1401(a). However, MPPAA also establishes a "pay now, dispute later" rule. 29 U.S.C. § 1401(d). An employer assessed with withdrawal liability must commence payments in accordance with the pension plan's demand while the

2. Arbitration.

In the arbitration, Midwest indicated that it only sought to challenge the withdrawal liability assessment on *constitutional* grounds. Therefore, the arbitrator was only asked to resolve certain factual issues which Midwest believed were relevant to the constitutional challenge. Midwest App., p. 62a. This left resolution of the ultimate constitutional issue to the District Court. After a three day arbitration hearing, the arbitrator (Malcolm Pritzker) made the following findings:

a. No evidence of the amount of liability imposed on Midwest resulting from its pre-ERISA participation. The Arbitrator found that Midwest had first elected to participate in Central States prior to the enactment of the Employee Retirement Income Security Act ("ERISA") in 1974. Midwest App., pp. 65a-66a. However, the arbitrator also found that Midwest had elected to continue its participation in Central States *after* the enactment of ERISA, and did so until its withdrawal from the Pension Fund in 1994. *Id.* Further, the arbitrator concluded that Midwest had failed to offer any evidence showing what portion (if any) of its total withdrawal liability ($2,546,439.30) is attributable to its experience as *pre*-ERISA (*i.e., pre*-1974) employer, as opposed to its post-ERISA experience. *Id.*

b. Midwest did not interfere with the union decertification election. The arbitrator concluded that Midwest had not interfered with the decision of Midwest's employees to decertify the union. Midwest App., pp. 66a-67a. The decertification vote was the *final* event in the chain of circumstances that preceded Midwest's complete and permanent withdrawal from Central States. *Id.*

---

parties proceed to arbitrate the merits of the dispute. 29 U.S.C. § 1401(d). If the employer prevails in arbitration, its interim payments to the pension plan are to be refunded with interest. *Id.*

c. Midwest's control over factors impacting its withdrawal liability. The arbitrator concluded that Midwest had at least some control over the factors that produced Central States' UVBs (and hence Midwest's withdrawal liability for a pro-rata share of the UVBs). Midwest App., pp. 69a-70a.

3. District Court Ruling.

Pursuant to 29 U.S.C. § 1401(b)(2), Midwest then took its constitutional challenge to the U.S. District Court for the Northern District of Illinois. In a March 31, 1998 Memorandum Opinion and Order, the District Court (Judge Wayne Andersen) rebuffed Midwest's challenges under the "due process" and "takings" clauses of the Fifth Amendment. The district court noted that MPPAA had previously withstood constitutional scrutiny in *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), and *Concrete Pipe v. Construction Laborers Pension Trust Fund*, 508 U.S. 602 (1993). Midwest argued that those cases involved a "facial" challenge under the Fifth Amendment, and that MPPAA was unconstitutional as applied to Midwest's particular circumstances. However, based upon the record and findings in the arbitration, the District Court found that:

a. Midwest failed to show a retroactive impact. In 1974, ERISA already imposed a form of "withdrawal liability" on employers participating in multiemployer pension plans. Midwest App., pp. 41a-42a. Midwest agreed to renew its participation after the enactment of ERISA, and Midwest could not show that any portion of its ultimate withdrawal liability resulted from its *pre*-ERISA participation in Central States. *Id.* In the District Court's view, this circumstance deflated Midwest's claim that it was being subjected to a fundamentally unfair form of *retroactive* liability. *Id.*

b. Midwest had control over the factors leading up to its withdrawal. The District Court noted that although Midwest did not directly participate in the union decertification election held by its employees, Midwest "exercised sufficient control over the chain of events that culminated in the decertification." Midwest App., p. 39a. Midwest's control over these circumstances was evident in the positions it took during its labor negotiations, which precipitated and prolonged the strike. *Id.* In addition, during the strike Midwest hired and retained the replacement employees who participated in the 1994 union decertification election. *Id.*

c. Midwest had control over the factors impacting unfunded vested benefits. The district court concluded that Midwest's participation in the bargaining process by which pension contribution levels were set gave it "sufficient control over the . . . factors affecting Central States' unfunded vested benefit liabilities to satisfy the lenient rational basis test." Midwest App., p. 46a. In addition, in its collective bargaining agreements, Midwest had expressly and repeatedly *ratified* the actions taken by the Central States Board of Trustees in the management of the Pension Fund. Midwest App., pp. 42a-43a.

4. Seventh Circuit Ruling.

Midwest then appealed to the Seventh Circuit. That court affirmed the judgment in favor of Central States. The Seventh Circuit noted that a party challenging the constitutionality of an enactment under the due process clause "must show that a legislature acted in an arbitrary and irrational way." Midwest App., p. 9a, *citing Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). Although Midwest persisted in complaining about an allegedly "retroactive" application of the withdrawal liability provisions of ERISA, the Seventh

Circuit observed that under the due process clause, even "retroactive" economic regulation is permitted as long as the legislation has a rational purpose. Midwest App., p. 9a. The Court of Appeals concluded that the imposition of withdrawal liability upon Midwest was "a perfectly reasonable means of securing Congress' legislative goal of protecting the pension benefits of the Central States beneficiaries." Midwest App., p. 12a.

Turning to the issue of whether withdrawal liabiiity violated Midwest's Fifth Amendment right to be protected against a regulatory "taking" of its property, the Seventh Circuit noted that one of the most important factors in the "takings" analysis is to determine whether Midwest's liability was "out of proportion to [its] experience with the plan." Midwest App., p. 14a, *citing Eastern Enterprises v. Apfel,* 118 S.Ct. 2131, 2149 (1998). Here the Court of Appeals noted that unlike the application of the Coal Act, 26 U.S.C. §§ 9701-9722, which a plurality of the Supreme Court found violative of the "takings" clause in *Eastern Enterprises v. Apfel,* MPPAA imposed a liability upon Midwest and other employers which was closely related to their actual participation in an employee benefit plan. On this basis, the Seventh Circuit affirmed the judgment against Midwest. *Id.*

REASONS FOR DENYING THE WRIT

Midwest opens its petition with the argument that the District Court did not have subject matter jurisdiction over Central States' withdrawal liability claim. Midwest contends that subject matter jurisdiction was lacking because Central States sued Midwest *before* the first withdrawal liability payment was due. Midwest ignores the fact that Central States' original complaint included a request for declaratory relief, *i.e.,* for a declaration that Midwest was obliged to comply with the withdrawal lia-

bility payment schedule. Central States was correct in anticipating that Midwest would fail to follow the "pay now, dispute later" rule established by MPPAA. Moreover, Central States *amended* its complaint to state a claim for money damages after the first withdrawal liability payments fell due and Midwest failed to pay. There is no split in the circuits on this question: No federal circuit has diverged from the rule that a jurisdictional defect in an original complaint may be remedied through amendment. Indeed, there is a federal statute (not cited by Midwest) which commands this result. 28 U.S.C. § 1653. Hence there is no need for the Court to review the Seventh Circuit's resolution of the jurisdictional issue raised by Midwest.

The issue raised by Midwest under the due process clause of the Fifth Amendment of the U.S. Constitution is also unworthy of review by this Court. Midwest's due process challenge only presents a rehash of issues concerning the constitutionality of MPPAA which this court considered in *Connolly* and *Concrete Pipe*. Midwest strains to argue that it was subjected to a severe form of "retroactive" (*i.e.*, pre-ERISA) withdrawal liability that was not presented in *Connolly* and *Concrete Pipe*. But as the findings of the Arbitrator and the District Court in this case make clear, Midwest failed to show which portion, if any, of its total withdrawal liability arose from its *pre*-ERISA participation in Central States. This Court's holding in *Concrete Pipe* makes clear that the threshold test for retroactivity with regard to employer withdrawal liability that might be violative of the due process clause is not whether the employer is faced with liability based upon its *pre-MPPAA* (*i.e.*, pre-1980) experience in a multiemployer pension plan, but whether the employer faces that type of liability based upon its *pre-ERISA* (*i.e.*, pre-1974) experience in the plan. *Concrete Pipe*, 508

U.S. at 646. Midwest can make no claim that any truly "retroactive" liability was imposed upon it.

In addition, Midwest's participation in and control over the chain of events that led up to its withdrawal from Central States, and its control over the factors that produced Central States' UVBs (and therefore the withdrawal liability) make this case a poor candidate to test limits of the due process clause. In addition, as this Court noted in *Eastern Enterprises v. Apfel,* 118 U.S. at 2149, under MPPAA (unlike the Coal Act as it was applied to the employer in that case) the amount of an employer's withdrawal liability is closely tied to the employer's actual participation in the affected employee benefit plan. This anchors the rationality of the MPPAA scheme, and Midwest has shown no grounds to distinguish its case from the employers who challenged the rationality of MPPAA under the due process clause in *Connolly* and *Concrete Pipe.*

Midwest's invocation of the *ex post facto* clause is simply misplaced. First, Midwest did not raise the *ex post facto* issue in the courts below. Neither the District Court nor Court of Appeals opinions address this issue, and they were not asked to do so. Moreover, this Court's precedents make clear that the *ex post facto* clause only comes into play in reviewing *criminal* legislation. Finally, as discussed above, Midwest has shown scant grounds to conclude that the liability it faces in this case is in any constitutionally meaningful sense "retroactive." Therefore, even if the Court were inclined to reexamine its traditional analysis of the *ex post facto* clause, this case would not facilitate that process.

ARGUMENT

I. MIDWEST HAS SHOWN NO GROUNDS FOR THIS COURT TO REVIEW THE SEVENTH CIRCUIT'S HOLDING CONCERNING THE ALLEGED "PREMATURITY" OF CENTRAL STATES' ORIGINAL COMPLAINT.

Provided that the underlying dispute presents a federal question, pursuant to 28 U.S.C. § 2201, federal district courts have power to resolve civil actions seeking *declaratory* relief. Central States' initial complaint in this action (filed in the U.S. District Court for the Northern District of Illinois) was filed before Midwest's first withdrawal liability payment was due. However, Central States' initial complaint sought a declaration, pursuant to 28 U.S.C. § 2201, that Midwest was obliged to comply with the withdrawal liability payment schedule. Midwest itself brought a "mirror image" action for declaratory relief in the U.S. District Court in North Dakota. Midwest App., p. 7a. Like Central States, Midwest brought its declaratory judgment action before the first withdrawal liability payment was due. This confirmed that there was an actual, justiciable case or controversy between the parties *prior* to the due date of Midwest's first withdrawal liability payment. This is exactly the type of situation which the declaratory judgment act was intended to address. In short, there was no defect in the federal jurisdictional allegations in Central States' original complaint filed in the Northern District of Illinois.

A consideration of the declaratory nature of the relief originally sought by Central States also puts to rest Midwest's contention that Central States' withdrawal liability claim is at odds with this Court's holding in *Bay Area Laundry & Dry Cleaning Pension Trust v. Ferbar Corporation*, 552 U.S. 192 (1997). Midwest Petition, p. 9. *Bay Area* held that a money judgment claim for withdrawal

liability arises after the employer receives statutory notice of the withdrawal liability claim *and* fails to pay in accordance with the schedule of payments included in the notice. But nothing in *Ferbar* precludes a plan from seeking a *declaration* that the employer is bound to adhere to the payment schedule, even if the first required payment has not yet fallen due. Where there is a case or controversy between the parties concerning their rights and obligations under the payment schedule, it is appropriate to seek declaratory relief.

But even if the original complaint had been defective from the standpoint of federal jurisdiction, any such defect was cured by means of Central States' amended complaint. As we have seen, the amended complaint was filed *after* Midwest had missed its first few withdrawal liability payments; therefore, the amended complaint requested a money judgment for the missed payments. Midwest App., pp. 7a-8a. Pursuant to 28 U.S.C. § 1653, any jurisdictional defects in Central States' original complaint were cured by means of the amended pleading. Therefore, the reasoning and result of the Seventh Circuit with regard to the "jurisdictional" issue raised by Midwest was no different from that which would have been employed and reached by any other Circuit. *See, e.g., Leveraged Leasing Admin. Corp. v. Pacific Corp. Capital, Inc.*, 87 F.3d 44, 47 (2d Cir. 1996); *Tolton v. American Biodyne, Inc.*, 48 F.3d 937, 941, n. 2 (6th Cir. 1995). There is simply no reason for this Court to review the Seventh Circuit's analysis of this issue.

But Midwest argues that the Seventh Circuit violated the "relation back" doctrine of Fed.R.Civ.P. 15(c). That is, Midwest says because that under Rule 15(c) the amended complaint had to "relate back" to the date of filing of Central States' original complaint, the *facts* relating to the jurisdictional allegations must be taken as they

existed at the time of the original complaint. Midwest's Petition, pp. 13-14. This is perhaps the most specious argument advanced by Midwest. In commanding "relation back," Rule 15(c) says, "An amendment of a pleading relates back to the *date of* the original pleading. . . ." (emphasis added). This means that the date of the *filing* of the amended complaint shall be deemed the same as the date of filing of the original complaint. Thus, Rule 15(c) protects against the lapse of a statute of limitations, so long as the amended complaint and the original complaint relate to the same "transaction, event or occurrence." Advisory Committee Notes to Fed.R.Civ.P. 15(c). Rule 15(c) does *not* state or in any way require that the underlying substantive dates or facts alleged in an amended complaint must be altered or construed differently than as they actually appear in the amended complaint itself. Midwest has completely misconstrued the meaning and effect of Rule 15(c).

II. THIS COURT SHOULD NOT REVIEW THE SEVENTH CIRCUIT'S ANALYSIS OF THE DUE PROCESS CLAUSE AS APPLIED TO MIDWEST.

The centerpiece of Midwest's argument concerning the due process clause of the Fifth Amendment is Midwest's contention that it has been subjected to a severe form of "retroactive" liability under MPPAA that was not present in *Connolly*, 475 U.S. 211, and *Concrete Pipe*, 508 U.S. 602. By "retroactive" liability, Midwest means liability arising from its experience and participation as a contributing employer in Central States prior to the enactment of MPPAA in 1980.

But in *Concrete Pipe* this Court made clear that the crucial date for determining whether MPPAA has had the type of "retroactive" impact that might raise a constitutional concern is 1974—the date of the enactment of ERISA—and not 1980. In *Concrete Pipe* the Court ob-

served that with the enactment of ERISA in 1974, employers who participated in multiemployer plans already faced a form of "withdrawal liability" that was in many respects similar to that ultimately imposed by MPPAA in 1980. *Concrete Pipe*, 508 U.S. at 646. Although under ERISA, withdrawal liability was generally limited to 30% of the net worth of the employer, "there [was] no reasonable basis to expect that the legislative ceiling would never be lifted." *Id.* Thus, in *Concrete Pipe* the Court concluded that "pension plans had long been subject to federal regulation" and "those who do business in the regulated field cannot object if the legislative scheme is butressed by subsequent amendments [e.g., MPPAA] to achieve the legislative end." *Concrete Pipe*, 508 U.S. at 646 (citations omitted). Therefore, the employer in *Concrete Pipe*—who began participating in a multiemployer pension plan in 1976 (after the enactment of ERISA but before the enactment of MPPAA)—was not found to have been subjected to a form of "retroactive" liability that raised a concern under the due process clause. *Id.*

Midwest is in the same position as the employer in *Concrete Pipe*. Midwest began participating in Central States well before ERISA came into effect in 1974. But Midwest voluntarily renewed its participation thereafter. More important, there are clear findings by the Arbitrator and the District Court in this case that Midwest had failed to establish which portion (if any) of its total withdrawal liability ($2,546,439.30) was attributable to its *pre-ERISA* (pre-1974) participation in Central States. The District Court noted that this failure precluded Midwest from making a credible argument that it faced retroactive liability in any constitutionally meaningful sense. Midwest App., pp. 41a-42a. And, of course, the Seventh Circuit, employing a slightly different rationale, affirmed the District Court.

The record in this case suffers from other infirmities which disable the arguments advanced by Midwest in its Petition. Midwest is struggling to fit its case within the concern expressed by Justice O'Connor in her concurrence in *Connolly*. Justice O'Connor was concerned about a hypothetical employer who incurs a withdrawal from a multiemployer pension plan "as a result of events over which the employer has no control." *Connolly*, 106 S.Ct. at 1030 (emphasis added). But in this case, the record is clear that although Midwest did not directly interfere in the union decertification election which *immediately* precipitated its withdrawal from Central States, Midwest did have control over the "chain of events" that caused and prolonged the strike and led up to the decertification election. Midwest App., p. 39a. This gave Midwest control over the events leading up to its withdrawal from Central States, and removes Midwest from the scope of concern expressed by Justice O'Connor in her *Connolly* concurrence.

However, in *Connolly*, Justice O'Connor also suggested that where employers have "*no* control over the level of benefits provided" under a multiemployer plan, and have "*no say whatsoever* in establishing critical features of the plan that determine the level of benefits," the employer might be able to launch a successful due process challenge to its withdrawal liability. *Connolly*, 106 S.Ct. at 1031 (emphasis added). But as the Seventh Circuit pointed out, the fact pattern in this case does not fall within Justice O'Connor's concern for employers who have "*no* control" over the factors impacting their withdrawal liability. Midwest App., p. 16a. The Arbitrator found that Midwest had at least some control over these factors. Midwest App., pp. 69a-70a. Midwest participated in labor negotiations which set the level of employer contributions to Central States; these contribution levels were, in turn,

conspicuously tied to *benefit* levels. Moreover, Midwest made no effort to quantify the amount of its total withdrawal liability that resulted from factors outside its control as opposed to those over which it did have control.

Midwest is in a particularly poor position to complain that the actions of the Central States Board of Trustees—rather than Midwest's own conduct—resulted in producing UVBs and the resulting imposition of employer withdrawal liability; Midwest repeatedly signed labor agreements which *ratified* the decisions and actions of the Central States Board. Midwest App., pp. 42a-43a.

Finally, Midwest has shown no flaw in the Seventh Circuit's discussion of the manner in which Midwest's withdrawal liability under MPPAA has been closely linked to its actual experience and participation in Central States. Midwest App., pp. 14a-15a. Under MPPAA, each participating employer is assigned a share of the pension plan's UVBs in direct proportion to the extent of the employer's participation in the plan. *Id.* Employers (and others) may disagree that this is the *most* efficient or fair way to address the UVB problem, but it is at least a rational approach and is not fundamentally unfair. The proportionality that MPPAA provides between (i) an employer's experience and participation in a multiemployer benefits plan and (ii) the liability the employer may ultimately face, distinguishes MPPAA from the Coal Act which this Court scrutinized (and struck down in pertinent part) in *Eastern Enterprises v. Apfel.* The plurality opinion in that case noted this distinction between the Coal Act and MPPAA. *Eastern Enterprises,* 118 S.Ct. at 2149.[2]

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[2] Midwest argues that Central States' UVBs have been *reduced* over time (Midwest Petition, p. 25), but it does not deny that a significant portion of the UVBs remains. Nor does Midwest deny that Central States has correctly calculated Midwest's *pro-rata* share of responsibility for payment of the UVBs.

For these reasons, the Seventh Circuit correctly analyzed this case under the due process clause of the Fifth Amendment. This case presents no new issues concerning MPPAA left unresolved by the prior opinions of this Court in *Connolly* and *Concrete Pipe*.

III. MIDWEST HAS WAIVED ANY CHALLENGE TO MPPAA UNDER THE EX POST FACTO CLAUSE, AND MIDWEST HAS FAILED IN ANY EVENT TO SHOW ANY "RETROACTIVE" LIABILITY.

Neither the District Court nor Seventh Circuit opinions in this case discuss or even mention the *ex post facto* clause of Article I, Section 9 of the U.S. Constitution. The courts below had no reason to do so, since Midwest raised no argument concerning the *ex post facto* clause until it filed its Petition for a Writ of Certiorari with this Court. Accordingly, even if this Court were to deem the *ex post facto* issue worthy of review in an appropriate case, this is not such a case. That issue simply was not litigated below. *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation.")

Further, because, as discussed above, Midwest has failed to specify and quantify any truly *retroactive* liability imposed upon it by the legislation at issue in this case, this is not an appropriate case to reexamine the historic interpretation of the *ex post facto* clause. As Midwest's argument concerning retroactivity and the *ex post facto* clause in its Petition filed with this Court states:

> In the instant case there is an employer who agreed no later than 1958 to begin participation in a union-management sponsored pension plan . . . *Beginning in 1974*, however, and reaching a culmination in 1980 with the enactment of MPPAA, this world changed in a manner that Midwest did not and could

> not have foreseen. *From a date preceding the enactment of MPPAA [in 1980]*, Midwest would be held responsible retroactively for its pro rata share of the pension plan's underfunding. The retroactivity of this enactment meant that there was no way it could alter its conduct so as to avoid the burdens imposed by the statute

Midwest Petition, p. 28 (emphasis added). The reference to "a date preceding the enactment of MPPAA [in 1980]" is, of course, the date of the enactment of ERISA—1974. Bringing the focus back to 1974 in this way points up the glaring deficiency in Midwest's proof in this case. As we have seen, Midwest failed to show the amount of withdrawal liability which it accrued "beginning in 1974" with the passage of ERISA. *Concrete Pipe*, 508 U.S. at 646, held that the pre-1974 accrual of withdrawal liability is the only withdrawal liability that can legitimately be termed "retroactive" for purposes of a constitutional challenge. Midwest's own discussion of retroactivity (quoted above) seems to concede and confirm this point, but Midwest makes no effort to address its failure to specify any amount of withdrawal liability that resulted from its *pre-1974* experience as a participating employer in Central States.

As Midwest also concedes, a long line of precedent in this Court has held that only *criminal* legislation is subject to scrutiny under the *ex post facto* clause. Midwest Petition, pp. 28-29. Perhaps the Court may wish at some point to reexamine that precedent, but Midwest has presented no compelling reason to do so. More important, Midwest has failed to demonstrate that it has suffered from any truly retroactive impact of the legislation it seeks to strike down under the *ex post facto* clause. Therefore, this case does not present an opportunity for reinterpreting the *ex post facto* clause.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfuly submitted.

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APPENDIX

APPENDIX

Excerpt from Transcript of Proceedings
Before the American Arbitration Association
Dated January 14, 1997

* * * *

[233] Q. And I call your attention to Central States Exhibit 74, a September 24, 1996, letter from you to Mr. Ron Kubalanza, the executive director of Central States.

MR. AITKEN: I'm sorry. What number is that?

MR. CONDON: It's 74, Central States Exhibit 74.

MR. AITKEN: My Exhibit 74, if I'm reading this correctly, is a letter to Ron Carey from Ray Cash, Jerry Cook, Joe Orrie, and Jerry Younger.

THE WITNESS: It's an attachment.

MR. CONDON: Yeah. It's an attachment to that. I'm sorry. It's the first attachment, I think, to that letter.

ARBITRATOR PRITZKER: Okay. Do you have that?

MR. AITKEN: Yes.

ARBITRATOR PRITZKER: Okay.

BY MR. CONDON:

Q. Is that September 24, 1996, letter that you wrote to Nancy Wag—that you, Nancy Wagner, wrote to Ron Kubalanza, the executive director of Central States, your analysis of the requested benefit increase?

A. [By Nancy Wagner, Central States' enrolled actuary] Yes. This is my response to that letter.

Q. And in that letter, did you conclude that in [234] your opinion, "A decision to increase benefits now would jeopardize the security of the benefits already earned and future benefits anticipated to be earned by current plan participants"?

Q. And what was the—and what was the decision of the trustees with respect to this requested benefit increase by the Teamsters?

A. They—I believe that they responded that it was not a prudent thing to do. And they enclosed a copy of my letter to them—or to Mr. Kubalanza stating that, the reasons for that.

Q. Based upon your experience at Central States as the enrolled actuary and your ability to observe the workings of Central States, does a contributing employer have any control over the benefit increases granted at Central States in general?

A. Well, all of the benefit increases are approved by the board of trustees. And there's four employer representatives on the board of trustees and four union.

Q. Is there any other type of control, based upon your experience, that a contributing employer has with respect to benefit increases?

[235] A. Well, certainly with respect to his own group of employees that he's making contributions on, the employer has control over those contribution levels. Those are negotiated, and the employer has to agree to the contributions that are made to the fund. And it's the contributions tha govern the benefit levels provided to his employees.

MR. CONDON: I don't have any further questions.

ARBITRATOR PRITZKER: Okay, Cross-examine.

MR. AITKEN: Five-minute break?

ARBITRATOR PRITZKER: Sure.

(WHEREUPON, a recess was had.)

ARBITRATOR PRITZKER: Okay. Back on the record.

MR. AITKEN: Good morning.

I understand opposing counsel to state that he was introducing Exhibit 71 and—

MR. SHEETZ: 74.

MR. AITKEN: —74 to establish a general pattern of the way that the trustees deal with proposed benefit increases. Is that not true?

MR. CONDON: As part of the general practice.

MR. AITKEN: Okay. I would first like to express my confustion over Exhibits 71 through 74 because as I see it, Exhibit No. 71 is a letter to the four union [236] trustees from Ron Carey. Is that not the case?

MR. CONDON: That is correct.

MR. AITKEN: Okay. Exhibit 72—

MR. CONDON: I don't want to interrupt you, Mr. Aitken, but I wasn't offering 72.

MR. AITKEN: No, I understand.

MR. CONDON: Okay.

* * * *

Q. In your experience, are the employers informed of—can you state whether or not employers are informed of the level of benefit increases that are going to be associated with any contribution rate increases that they agree to?

A. [By Mr. Nelson, Central States' Director of Benefits] By employer, the employer negotiators clearly are informed because that's an issue that's discussed at the bargaining table.

In the '94 and in the '91 National Master Freight Agreements, there was in fact a flyer included with the ballot that went out to the individual members, and that was all reviewed in advance, just saying that if this contract was ratified with the increases specified in the article, these are the benefits that the trustees could possibly provide it.

The problem is in these negotiations, it's almost a simultaneous equation that you've got the dollars; you've got the benefits; you need to get the whole contract ratified. So the benefits are typically not formally adopted by the trustees until subsequent to the negotiations because we don't know if the contract will be ratified.

And I'm speaking for freight because it's the one that's created the new benefits. People that follow freight may just agree to freight or to some other class of benefits.

Q. Is it the usual practice—can you tell me whether or not it's the usual practice at Central States to seek advice from the actuaries with regard to the actuarial impact of any benefit increases?

A. It is—yes, it is the practice at all times to have actuarial advice.

Q. Do you—and who has the ultimate authority to decide about the level of any benefit increases?

A. That would be the trustees' responsibility.

Q. To your knowledge, has the board of trustees ever disregarded any actuarial advice that the actuaries have provided concerning any proposed benefit increases?

A. To my knowledge, they have not.

Q. Now, reaching back in all your—to all your experience in the benefits area, which began in the mid—or 1980s, is it your experience that—can you say whether it's the usual experience at Central States that where the trustees do grant an increase in benefit as a result of increased rates under a newly negotiated National Master Freight Agreement that it is the practice that prior to the time the negotiators execute that agreement, all the negotiators are informed of the level of benefit increases that will be associated with the increase in contribution rates?

A. The information is available.

Q. Okay.

A. You know, whether they're—the fund does not go out and seek out every negotiator, but it's available at the bargaining table.

* * * *

(3)

No. 99-420

Supreme Court, U.S.
FILED
OCT 21 1999
CLERK

IN THE

Supreme Court of the United States

MIDWEST MOTOR EXPRESS, INC.,
MME, INC., MIDNITE EXPRESS, INC.,
and EXPRESS CARTAGE, INC.,
Petitioners,

v.

CENTRAL STATES SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

REPLY BRIEF OF PETITIONERS

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IN THE

Supreme Court of the United States

No. 99-420

MIDWEST MOTOR EXPRESS, INC.,
MME, INC., MIDNITE EXPRESS, INC.,
and EXPRESS CARTAGE, INC.,
Petitioners,

v.

CENTRAL STATES SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONERS

Petitioners, Midwest Motor Express, Inc., MME, Inc., Midnite Express, Inc., and Express Cartage, Inc. (collectively referred to hereafter as "Midwest") submit this Reply to address the matters asserted in the Brief in Opposition to Midwest's Petition for Certaiorari filed by Respondent Central States Southeast and Southwest Areas Pension Fund ("Central States").

I. THIS COURT'S DECISION IN *BAY AREA* PRECLUDES JURISDICTION IN THIS CASE.

A. Central States Admits It Filed This Action Prematurely.

In its initial petition, Midwest demonstrated that Congress, in ERISA, established strict procedural notice and demand of payment rules, with which a plan must comply

as a jurisdictional prerequisite for bringing a lawsuit. 29 U.S.C. § 1382. Those rules were clearly articulated by this Court in *Bay Area*. Petition for Certiorari at p. 10.

Central States admitted that it filed this action before Midwest's first withdrawal liability payment was due. Brief in Opposition at p. 12. However, Central States now seeks to create an elaborate and ingenious way to circumvent ERISA and *Bay Area*. It argues that by filing an admittedly "premature" complaint, which seeks declaratory relief, and anticipates an employer's refusal to pay, Central States can create a justiciable case or controversy giving jurisdiction to the court. Then, if the plan guesses correctly about the employer's response, it can file a second amended complaint, based on facts occurring after the filing of the initial complaint, to perfect the premature lawsuit.

This torturous process runs afoul of both ERISA and *Bay Area*. ERISA does not contemplate or allow "anticipatory" complaints. It sets forth simple procedural due process rules, requiring the plan to submit a written notice of demand for payment, allowing the employer 90 days to respond. 29 U.S.C. § 1399(b). It's purpose is twofold: (1) to provide a fair opportunity for the employer to evaluate and respond and (2) to promote judicial economy by avoiding a premature lawsuit which may be unnecessary, may be settled, or may have to be amended depending on the facts and employer's response. Central States' conduct, in fact, created additional litigation.

The Federal Declaratory Judgment Act, 28 U.S.C. § 2201, does not confer jurisdiction, as Central States suggests, but rather provides an additional remedy for a court which has proper subject matter jurisdiction. *Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599 (5th Cir. 1983). Central States had no right to sue Midwest when it filed its complaint, the court lacked jurisdic-

tion, and seeking declaratory relief under section 2201 does not cure this lack of jurisdiction.

This Court's recent decision in *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corporation of California, Inc.*, 552 U.S. 192 (1997) emphatically held that a fund's interest in receiving withdrawal liability payments does not ripen into a cause of action triggering the limitations period until after the employer defaults on an installment due and payable under the plan's schedule. *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. Of California,* 552 U.S. 192, 202 (1997). Only when an employer has violated a duty to a plan under MPPAA may the plan sue the employer: "[u]ntil the employer fails to honor its obligation, the plan cannot sue." *Id.* This Court should grant review not only to clarify a jurisdictional mistake but to prevent additional courts from circumventing its *Bay Area* holding by allowing anticipatory complaints for declaratory relief.[1]

B. The Relation Back Doctrine Does Not Save Central States' Complaint.

Recognizing the weakness in its theory that an "anticipatory" complaint seeking declaratory relief can create jurisdiction that otherwise does not exist, Central States argues that 28 U.S.C. § 1653 supports its position. It does not. Section 1653 allows a party to cure defective allegations of jurisdiction; it may not be used to create jurisdiction retroactively where it did not previously exist. *Aetna Cas. & Sur. Co. v. Hillman,* 796 F.2d 770 (5th

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1 Moreover, Midwest did not sue Central States in North Dakota until May 1994, App. pp. 5a and 56a, after Midwest's first interim payment was due on May 1, 1994. Reply Appendix at 6a (hereinafter referred to as "R. App. at ——"). Central States' contention that Midwest filed its action prior to the due date of its first payment is incorrect. Thus, Central States' reliance upon Midwest's filing as establishing a justiciable case or controversy between the parties prior to the first payment is also misplaced. Brief in Opposition at p. 12.

Cir. 1986). *See also, Advani Enterprises, Inc. v. Underwriters at Lloyds,* 140 F.3d 157 (2nd Cir. 1998).

Importantly, Rule 15(c) of the Federal Rules of Civil Procedure embodies this same principle. By allowing the second amended complaint to "relate back" to the time of filing its initial complaint, it seeks to prevent the statute of limitations from time-barring meritorious allegations, provided the court had subject matter jurisdiction in the first place. Rule 15(c) does not allow a party to create jurisdiction when subsequent events occur.

> Whether a cause of action has accrued is determined according to the facts existing at the time the action was commenced. Where an action has been commenced before the alleged cause of action has accrued, the subsequent occurrence of conditions or facts necessary to make the cause of action complete will not avail the plaintiff in maintaining his suit.

1 Am. Jur. 2d *Action* § 71.

In light of the elementary principle that facts that occur after the filing of a complaint cannot serve to create a claim that does not exist at the time of filing, it is clear that Central States did not assert a federal question at the time it initially filed its complaint. There was no jurisdiction when the complaint was filed, and the later amendment to allege facts that occurred after the filing does not change that fact.

II. MIDWEST'S WITHDRAWAL FROM CENTRAL STATES WAS INVOLUNTARY CONTRARY TO CENTRAL STATES' FACTUAL MISREPRESENTATION REGARDING THE DATE AND CAUSE OF MIDWEST'S WITHDRAWAL.

On page 3 of Central States' Brief in Opposition, Central States identifies early August 1991 as the time that Midwest tendered a bargaining proposal calling for withdrawal from Central States and further identifies

August 12, 1991 (the date the union's strike began) as the date on which Midwest permanently ceased to have an obligation to contribute. By this identification, Central States implies the existence of the type of employer conduct detrimental to plan participants in Justice O'Connor's analysis in *Connolly v. PBGC*, 475 U.S. 211, 229 (1986) (O'Connor, J. concurring) and *Concrete Pipe v. Construction Laborers Pension Trust Fund*, 508 U.S. 602, 647 (1993) (O'Connor, J. concurring). Brief in Opposition at p. 3. Central States cited the arbitrator's decision in support of that factual statement, App. p. 54a, leaving the impression that Midwest's bargaining offer had created the withdrawal. This is incorrect. On the next page of the arbitration decision, the arbitrator noted that in May 1992, the parties had reached agreement regarding a package of wage and benefits concessions "which would have kept Midwest in the [Central States] Fund." App. 55a. What is implicit in the arbitrator's decision, although ignored by Central States, is what happened between those two dates: the tendering of a bargaining proposal by Midwest requiring its continued participation in Central States. Therefore, Midwest did not have a permanent cessation of its obligation to contribute to Central States until Midwest's employees voted to decertify the International Brotherhood of Teamsters on April 15, 1994. App. 22a. Contrary to Central States' misrepresentation, the arbitrator found that Midwest's withdrawal was involuntary. App. 66a. Moreover, the district court found that Midwest did not participate in the employees' decertification decision. App. 22a. Therefore, under the analysis of Justice O'Connor's concurrence in *Connolly* and *Concrete Pipe* there was no employer conduct regarding the withdrawal. Petition at p. 20-21.

III. THERE IS RETROACTIVE WITHDRAWAL LIABILITY IN THIS CASE.

Central States principally contends that Midwest had not established its amount of pre-Employee Retirement Income Security Act of 1974 ("ERISA"), liability and, therefore, that Midwest failed to quantify any portion of the withdrawal liability assessment that had an unconstitutional retroactive impact upon it. Brief in Opposition at pp. 6, 7, 10, 11, 14, 15, 18, 19.

There is retroactive withdrawal liability in this case because the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") first established the concept of withdrawal liability. 29 U.S.C. § 1381, ("Withdrawal liability established; criteria and definitions.") Pre-MPPAA liability with respect to a multiemployer pension plan such as Central States was limited to two instances, in both of which the multiemployer plan was terminated. First, under 29 U.S.C. § 1363, there was liability for a substantial employer (an employer that contributed 10 percent or more of all plan contributions) for withdrawal, limited by the requirement that the plan itself terminate within five years. 29 U.S.C. § 1363(c)(2). Second, under 29 U.S.C. § 1364, ERISA provided for the liability of all contributing employers that withdrew from the plan within the last five years before a termination of the plan. Neither pre-MPPAA circumstance would have applied to Midwest, because Midwest was not a substantial employer and because the Central States Fund has not terminated. Thus, but for MPPAA, enacted September 26, 1980, Midwest would not be subject to any liability.

Moreover, the court of appeals below acknowledged that:

> the MPPAA has a retroactive aspect, since withdrawal liability imposes on the withdrawing employer a share of the unfunded vested liability pro-

> portionate to the employer's share of contributions to the plan during the years of its participation, *Concrete Pipe*, 508 U.S. at 610, even if the years of its participation in the plan preceded the effective date of the MPPAA or the enactment of ERISA itself.

App. 4a. Thereafter, the court of appeals correctly noted that:

> on April 26, 1994, Central States issued an assessment of withdrawal liability and a demand for payment in the amount of $2,546,439.39, listing Midwest's 'pre-1980 Pool Liability' as $1,814,856.36 and its 'post 1979 Pool Liability' as $731,582.94. The 'pre-1980 Pool Liability' is the retroactive withdrawal liability imposed by the MPPAA, effective from 1980, the year specified in the amendment.

App. 5a. It is clear that retroactive liability exists in this case.

IV. MIDWEST HAD NO CONTROL OVER THE LEVEL OF BENEFITS OR ANY OTHER FACTOR THAT MAY PRODUCE UNFUNDED VESTED BENEFITS FOR CENTRAL STATES.

As described by Central States, the arbitrator, and the courts below, Midwest has been deemed to have exercised some control over the level of benefits and contributions that lead to the creation of unfunded vested benefits based on the decisions of management-appointed trustees on the board of trustees that governs Central States.

First, there are indeed management-appointed trustees on Central States' Board of Trustees, but by this Court's decision in *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981), that presence cannot be used to infer control, or even influence, of their actions by the party that appointed the trustees. As the Court stated in *Amax Coal*, the duty of a management-appointed trustee is "directly antithetical" to that of an agent of the appointing party. *NLRB v. Amax Coal Co.*, 453 U.S. 322, 341-2 (1981).

As a matter of law, therefore, Midwest could not have been deemed to have any control over any decision by the trustees of Central States.

With respect to Central States' claims that Midwest controlled the contribution levels, Brief in Opposition at 4, the district court found that:

> The Trustees determine the level of benefits paid to participants and beneficiaries. Actuaries [of the Plan] advise the Trustees on appropriate benefit levels in light of the Plan's assets and income. The actuaries also determine the level of contributions necessary to support the benefits disbursed.

App. 2a. The district court found that plan actuaries determine the level of contributions based on an admission by Central States. In the arbitration proceedings a Central States witness admitted that, in the course of negotiation of the National Master Freight Agreements, to which Midwest was a signatory at all times, both union and employer negotiators, when discussing pension benefit increases, would ask plan actuaries to determine the level of contributions necessary to support those benefit levels. R. App. at 7a-8a. Thus, the district court made its finding that plan actuaries determine the level of pension contributions based on an admission by Central States.

The only factor that creates plan underfunding is the determination of the level of pension benefits by plan trustees. As noted by the Seventh Circuit, the critical element that creates plan underfunding is the establishment of the level of pension benefits:

> The plan trustees (appointed equally by the employers and the union) determine the level of benefits acording to actuarial assessments of the plan's value and future performance. When these assessments are too conservative, the plan ends up with a surplus that can be applied to future benefits. When the assessments are too optimistic, unfunded benefits result.

App. 11a. This is solely a responsibility of the Trustees and in no way can be attributable to Midwest.

Simply put, because Midwest had no control over the trustees, the level of pension benefits, or the level of contributions, Midwest had no control over any factor that produces underfunding for Central States and falls squarely within Justice O'Connor's concerns in *Connolly* and *Concrete Pipe*. In this context, ratification of trustee actions in bargaining agreements under pain of strikes and payment of withdrawal liability do not evidence control, but rather its exact opposite.

V. MPPAA'S RETROACTIVE LIABILITY IS AN UNCONSTITUTIONAL EX POST FACTO ENACTMENT.

Contrary to Central States' argument that this is not an appropriate case to deem the *Ex Post Facto* Clause worthy of review because that issue was not litigated below, this issue became ripe for consideration by this Court when the court of appeals found that Midwest's challenge under the Takings Clause failed under the traditional test. App. at p. 15a. In his concurrence in *Eastern Enterprises v. Apfel,* Justice Thomas said that he would be willing to re-consider the restrictive application of the *Ex Post Facto* Clause of the Constitution by *Calder v. Bull*, 3 Dall. 386, 1 L.Ed. 648 (1798) to criminal cases only when a retroactive civil law passes muster under current Takings Clause jurisprudence. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S.Ct. 2131, 2154 (1998). This case met Justice Thomas's standard on the date of the decision by the appellate court, but not before.[2]

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[2] Midwest notes that *Eastern Enterprises* was decided on June 25, 1998, after the arbitration and district court decisions. Further, this Court's decision in *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959) does not stand for the proposition that the *Ex Post Facto* Clause is not worthy of review in this case because that issue was not litigated in the courts below as claimed by Central States. ***The Monrosa*** **stands for the proposition that the**

This case should also meet this Court's discretionary standard of deciding questions of public importance within the context of meaningful litigation. There are only two precedential questions to this issue that should be answered prior to granting certiorari to review this question. First, is there retroactivity in a civil statute in this case? Second, did the court below hold that Midwest's challenge under the Takings Clause failed? Since the answer in both cases is yes, this question is ripe for review by this Court.

CONCLUSION

This case presents issues important to American jurisprudence. For this reason, as well as the reasons set forth above and in the Petition, the Court should issue a writ of *certiorari*.

Respectfully submitted,

HERVEY H. AITKEN, JR. *
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Attorneys for
Midwest Motor Express, Inc.

* Counsel of Record

Supreme Court will not grant review when the issue is not of sufficient public importance, or when the facts are not justiciable, or if the parties have not had an opportunity to brief the issue before oral argument before this Court. Midwest can satisfy each of those elements on the *Ex Post Facto* issue in this case.

APPENDICES

APPENDIX A

Central States' Notice and Demand for Payment of Withdrawal Liability From Midwest

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CENTRAL STATES SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND
9377 W Higgins Rd
Rosemont IL 60018-4938

April 26, 1994

VIA CERTIFIED MAIL
RETURN RECEIPT # P 840 228 594
AND EXPRESS MAIL

Midwest Motor Express, Inc.
5015 Main Avenue, East
Bismarck, ND 58501

RE: NOTICE AND DEMAND FOR PAYMENT OF
WITHDRAWAL LIABILITY
MME, INC.
MIDWEST MOTOR EXPRESS, INC.
ASSESSMENT NO.: 4913053-WL940139-01

Gentlemen:

This is a demand for payment of withdrawal liability incurred as a result of a permanent cessation of contributions to Central States, Southeast and Southwest Areas Pension Fund (the "Fund") by the above captioned business on behalf of some, or all, of its bargaining unit employees. This demand is made pursuant to Section 4219 of the Employee Retirement Income Security Act of 1974, as amended (29 U.S.C. 1399(b)), and applies equally to all members of any controlled group of trades or businesses, as defined in Section 414(c) of the Internal Revenue Code, of which the above captioned business is a member.

The total amount of such withdrawal liabiilty is $2,546,-439.30.

Please make your check payable to Central States, Southeast and Southwest Areas Pension Fund and forward it to the address as follows:

CENTRAL STATES WITHDRAWAL LIABILITY
P. O. Box 71262
Chicago, Illinois 60694

Please write the assessment number on your check.

At your option, the withdrawal liability may be amortized and paid in monthly installments according to the enclosed minimum required payment schedule, or such liability may be paid in a lump sum. No penalty, interest or amortization charges will be applied if payment of the entire withdrawal liability is received by this office on or before June 1, 1994. If you choose the monthly installment option, amortization charges will accrue on the outstanding balance at the annual rates indicated on the enclosed minimum required payment schedule.

Subject to applicable regulations, if any payment of withdrawal liability is not made when due and such payment plus delinquency charges is not made within sixty (60) days after receiving written notice from the Fund of such delinquency, the Fund may require immediate payment of the remaining balance of the withdrawal liability plus delinquency charges accrued from the due date of the first payment which was not timely made.

Enclosed herewith are documents as follows:

1. A copy of the withdrawal liability calculation;
2. A copy of the minimum required payment schedule for the monthly installment option;

3. A copy of the Fund's procedure governing review of any items relating to the determination and calculation of withdrawal liability, the minimum required payment schedule, and the resolution of disputes regarding withdrawal liability.

Sincerely,

/s/ Harry E. Keil
HARRY E. KEIL
Manager, Delinquent Accounts

HEK:SMT:cc-mm
Enclosures

cc: Withdrawal File

Please Note: For inquiries relating to the calculation of this assessment contact Gina Alvarez on extension 3097.

For all other inquiries contact Susan M. Tebbens on extension 3608.

Controlling Employer: MME, Inc.
Assessment No.: 4913053-WL940139-01

Withdrawn Company: Midwest Motor Express, Inc.
Address:

Type of Calculation: 1991 Complete Withdrawal

Date Prepared: 21-Apr-94

Section I—Pre-1980 Pool

a. Net Employer Contributions (1975-1979)

Year	Contributions	# CBUs
1975	$305,622.50	0.0
1976	$407,913.00	0.0
1977	$485,889.00	0.0
1978	$567,484.00	0.0
1979	$773,254.00	0.0
Total	$2,540,162.50	0.0

b. Net Contributions All Employers (1975-1979) $1,993,217,854

c. Allocation Fraction 0.0012744028

d. Unamortized 12/31/79 UVB $1,424,083,736

e. Pre-1980 Pool Liability $1,814,856.36

Section II—Post-1979 Pool

a. Net Employer Contributions (Last 10 Years)

Year	Contributions	# CBUs
1981	$846,011.00	17,025.0
1982	$710,957.00	13,229.0
1983	$830,696.00	15,109.0
1984	$755,717.00	13,744.0
1985	$784,087.00	12,552.0
1986	$733,677.00	10,800.0
1987	$719,843.00	10,005.0
1988	$691,056.00	9,476.0
1989	$652,151.00	8,942.0
1990	$583,199.00	7,995.0
Total	$7,307,394.00	

b. Net Contributions All Employers Last 10 Years $6,092.989,201

c. Allocation Fraction 0.0011993118

d. Net Change in UVB $610,002,272

e. Post-1979 Pool Liability $731,582.94

Section III—Adjustments to Liability

a. Unadjusted Liability $2,546,439.30

b. De Minimis Rule $0.00

c. Prior Assessment Credit $0.00

d. Partial Prorate $0.00

e. Sec. 4225 Limitation $0.00

f. Adjusted Liability $2,546.439.30

Section IV—Partial Prorate

a. # CBUs in Next Year 0.0

b. 5 Year Average # CBUs

Year	# CBUs
1986	10,800.0
1987	10,005.0
1988	9,476.0
1989	8,942.0
1990	7,995.0
Total	47,218.0

5 Year Average 9,443.6

c. Prorate Fraction 1.0000000000

d. Remaining Liability $2,546,439.30

e. Partial Prorate $0.00

Payment Schedule

a. High Contribution Rate (Weekly Rate Basis) $73.00

b. 3 Year Average # CBUs

Year	# CBUs
1981	17,025.0
1982	13,229.0
1983	15,109.0
Total	45,363.0

3 Year Average 15,121.0

c. Partial Prorate Fraction 1.0000000000

d. Annual Payment $1,103,833.00

e. Assessment $2,546,439.30

f. Amortization Period

Year	Rate	Interest	Opening Bal.	Closing Bal.
1	8.00%	$203,715.14	$2,750,154.44	$1,646,321.44
2	8.00%	$131,705.72	$1,778,027.16	$674,194.16
3	8.00%	$53,935.53	$728,129.69	$0.00
4	8.00%	$0.00	$0.00	$0.00
5	8.00%	$0.00	$0.00	$0.00
6	8.00%	$0.00	$0.00	$0.00
7	8.00%	$0.00	$0.00	$0.00
8	8.00%	$0.00	$0.00	$0.00
9	8.00%	$0.00	$0.00	$0.00
10	8.00%	$0.00	$0.00	$0.00
11	8.00%	$0.00	$0.00	$0.00

g. Monthly Payment Amount $97,576.65

h. No. of Monthly Payments 31.92

i. First Payment Due Date 01-May-94

APPENDIX B

**Excerpt from Transcript of Proceedings
Before the American Arbitration Association
Dated January 14, 1997**

* * * *

[74] Q. [By Mr. Condon, attorney for Central States] Are you generally familiar—going back to the mid-1980 period when you became director of benefits, are you generally familiar with the manner in which the negotiators of the National Master Freight Agreement have communicated with Central [75] States with regard to any proposed changes in the pension articles of that contract?

A. [By Mr. Nelson Central States Director of Benefits] The—I'm more familiar with say the '94 and the '91, less familiar with '88 and '85 because I had less direct involvement.

Generally speaking, the union side would be typically the first ones to contact the fund—and by the fund, it would either be myself or the executive director, Ron Kubalanza—with some concept as to benefit improvements they would want in negotiations. We would try to crystallize these and work with our actuaries to determine and translate those into a contribution rate.

At the same time, the employer trustees would contact us and determine what—in some kind of time frames—dollar package they were looking to put on the table. And by dollars, it's typically wages, health and welfare, and pension all combined. And we would look to work within those time frames, between wages—or those dollar frameworks to determine benefit needs balanced with dollar needs from the contributions.

We'd also within that work with the timing of the benefit implementation, what benefits may be [76] available immediately versus three years down the road or something like that, to try to get the dollars available and the benefit—perceived benefit wants to match.

In some cases, for example, the '85 agreement, we maybe even suggested the 30-and-out benefit. That's the first time that one appeared. Our actuaries said that that was something they saw in the future, and they put that out on the table. It did not come as a suggestion from the union necessarily, but it was something that we suggested as they might make it as attractive, and then we worked with the pricing on that.

* * * *